

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF &
APPENDIX**

75-1073
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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Appellee,

-against-

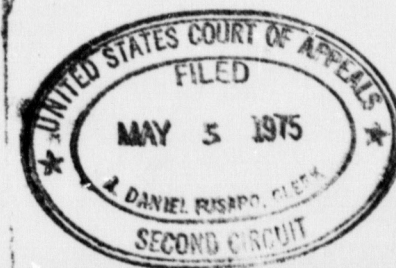
EDUARDO BERMUDEZ, JORGE VIVAS and
ISRAEL DIAZ-MARTINEZ,

Appellants.

-----X

and appendix
BRIEF OF APPELLANT
EDUARDO BERMUDEZ

Charles Sutton
Attorney for Appellant, Bermudez
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BRIEF OF APPELLANT BERMUDEZ

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UNITED STATES COURT OF APPEALS
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UNITED STATES OF AMERICA,

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STATEMENT AND FACTS

The defendant, Eduardo Bermudez, was indicted in the United States District Court for the Eastern District of New York under indictment number 74 Cr. 403, which was filed in that Court Clerk's Office on May 30, 1974 (A-9), alleging two counts which were recited at Count One and Count Six of that indictment.

Count One of the indictment alleged:

On or about between the 31st day of October, 1973, and the 1st day of May, 1974, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendants EDUARDO BERMUDEZ, JORGE VIVAS also known as Jorge Posos, ISRAEL DIAZ-MARTINEZ, MANUEL FIFFE also known as "Pfiefel", VICTOR BLANCO also known as "Red", and LUIS FELIPE MIRANDA, together with Juanita Diaz also known as "Jenny", herein named as a co-conspirator but not as a defendant, and others, did knowingly and intentionally conspire to violate Section 841(a)(1) of Title 21, United States Code.

1. It was a part of said conspiracy that the defendants and co-conspirators would knowingly and intentionally distribute and possess with intent to distribute cocaine hydrochloride, a Schedule II narcotic drug controlled substance.

2. It was further a part of said conspiracy that the defendants and co-conspirators would conceal the existence of the conspiracy and would take steps designed to prevent disclosure of their activities. (Title 21, United States Code Section 846).

Count Six of the indictment alleged:

On or about the 20th day of November, 1973, within the Eastern District of New York, the defendants EDUARDO BERMUDEZ, JORGE VIVAS, also known as Jorge Posos, MANUEL FIFFE, also known as "Pfiefel" and VICTOR BLANCO, also known as "Red" did knowingly and intentionally possess with intent to distribute approximately 1/2 kilogram of cocaine hydrochloride, a Schedule II narcotic drug controlled substance. (Title 21 United States Code, Section 841(a)(1) and Title 18 United States Code Section 2).

Trial was held before Chief Judge Jacob Mishler and a jury on October 15, 16, 17, 18, 22, 23, 24, 25 and 26, 1974. On October 26, 1974 the jury returned a verdict against defendant Bermudez of guilty as to Count One, the conspiracy count, and not guilty as to Count Six, the substantive count.

The defendant Bermudez was sentenced on Count One on February 7, 1975 by Chief Judge Mishler to imprisonment for a period of five (5) years and to a special parole term of ten (10) years that if defendant Bermudez is deported that he is not to reenter the United States or its territories or possessions during his parole term (A 45). The judgment of conviction was duly entered in the office of the clerk of that court on February 7, 1975. A notice of appeal was duly filed by the Clerk of that trial court in District Court on February 7, 1975 (A-6) and in this Court of Appeals on February 10, 1975 (A-48).

This appeal is taken in forma pauperis on the original record pursuant to the order of Chief Judge Jacob Mishler dated February 7, 1975 and the order of this Court dated February 19, 1975 (A-48).

The defendant Bermudez is about 35 years of age, married, has three children, one of whom was born in this country. His testimony shows that he was born in Colombia, that he began working at the age of 15 years, that he emigrated to this country ten years ago, that he worked steadily for Marriott Corp. for a period of nine years. The evidence shows that the defendant Bermudez has no prior criminal record whatever, either of arrests or of any kind whatever. The evidence shows that the defendant at no time had any unusual amounts of money and that in fact during the period at issue that he was in debt and had had to borrow money, to pawn his

wife's jewelry, had his wages garnished by Household Finance Corporation and eventually lost his automobile, transferring it to his co-maker to reimburse him for paying or being obligated to pay Household Finance Corporation. Two of his neighbors gave testimony of good character, honesty, integrity and being a law-abiding citizen (1105-1158) (1157-1172) (1172-1209) (1209-1258). He testified that as of November 20, 1973 he did not know Diaz (1126) and that he first met Vivas when he went to the Estrella Record Shop to buy records and clothes on November 20, 1973 (1126) (1221). Bermudez testified that he did not smoke, drink (except on holidays) or go to bars (1139) and that he never touched or had anything to do with cocaine (1137, 1138).

The only testimony given at trial against the defendant Bermudez was given by two witnesses: Manuel Fiffe and Barry Abbott.

Manuel Fiffe was a named defendant in this indictment. He pleaded guilty before trial to a single count in satisfaction of the entire indictment and upon a deal with the United States Attorney that he would write to the Kings County District Attorney informing him of Fiffe's "cooperation" in this case with a view to aiding and alleviating (if not wholly relieving Fiffe) of the sales of cocaine charges pending against Fiffe in the State Court by one or more indictments which consisted of at least five (5) counts carrying mandatory 15 years to life sentences.

Barry Abbott was a Drug Enforcement Agent who had worked "undercover" and had met Manuel Fiffe.

Manuel Fiffe testified that he did not know a single word of English and that he could neither speak nor understand a single word of English ().

Barry Abbott testified that he could neither speak nor understand Spanish and that he could only know form words and no more ().

Point I

Count One of the Indictment
is insufficient on its face.

Count One, the conspiracy count of this indictment, is insufficient on its face. Rule 7, F. R. Cr. Proc.

The defendants moved to dismiss the indictment before trial on a bail reduction motion and at the trial (October 5, 1974, 22A-32A), the trial court denied the motion (October 15, 1974, A).

The indictment must allege facts including an overt act which the Government must prove at trial.

United States v. Torres,
503 F. 2d 1120, 1125 (2 Cir. 1975).

The indictment does not allege any overt act and must be dismissed.

Point II

There was no evidence upon which to indict defendant Bermudez on the conspiracy count.

At the trial the government effectively conceded that the evidence against defendant Bermudez on the conspiracy count was based on the testimony only of government trial witness Manuel Fiffe (1673, 1674) as to an alleged incident which occurred on November 19, 1973. It should be noted here that on a motion to discuss the indictment for its failure to allege facts including a failure to charge an overt act under the conspiracy count (October 15, 1974) (22A) the Government asserted that the overt act upon which the conspiracy indictment was based was the substantive count, (Count Six) (October 15, 1974, 23A). The Government asserted that the "substantive count act on November 20, 1973; that that was an act in furtherance of the conspiracy; that we assumed that the defendant had met with his co-conspirators at some prior date, so that the substantive act that occurred on November 20th would be forthcoming." (October 15, 1974, 25A) (Underscoring added). Manuel Fiffe, however, had not given any testimony before the grand jury.

The conspiracy count of the indictment was not based on any testimony whatever but on an assumption by the Government. There was

"no substantial or rationally persuasive evidence upon which to base its indictment."

Costello v. United States,
350 U.S. 359, 364, 365 (1956)

In the concurring opinion of the Supreme Court in Costello, supra, Mr. Justice Burton stated:

"I agree with the denial of the motion to quash the indictment. In my view, however, this case does not justify the breadth of the declaration made by the Court. I assume that this Court would not preclude an examination of grand jury action to ascertain the existence of bias or prejudice in an indictment. Likewise, it seems to me that if it is shown that the grand jury had before it no substantial or rationally persuasive evidence upon which to base its indictment, that indictment should be quashed. To hold a person to answer such an empty indictment for a capital or otherwise infamous federal crime robs the Fifth Amendment of much of its protective value to the private citizen.

Here as in Holt v. United States, 218 U.S. 245, 54 L. Ed. 1021, 31 S. Ct. 2, 20 Ann. Cas. 1138, substantial and rationally persuasive evidence apparently was presented to the Grand Jury. We may fairly assume that the evidence before that jury included much of the testimony later given at the trial by the three government agents who said that they had testified before the Grand Jury. At the trial, they summarized financial transactions of the accused about which they were not qualified to testify of their own knowledge. To use Justice Holmes' phrase in the Holt case, such testimony, standing alone, was 'incompetent by circumstances' (supra, at 248), and yet it was rationally persuasive of the crime charged and provided a substantial basis for the indictment. At the trial, with preliminary testimony laying the foundation for it, the same testimony constituted an important part of the competent evidence upon which the conviction was obtained.

To sustain this indictment under the above circumstances is well enough, but I agree with Judge Learned Hand that 'if it appeared that no evidence had been offered that rationally established the facts, the indictment ought to be quashed;

because then the Grand Jury would have in substance abdicated. 221 F. 2d 668, 667. Accordingly, I concur in this judgment, but do so for the reasons stated in the opinion of the Court of Appeals and subject to the limitations there expressed. See also, Notes, 62 Harv L Rev 111; 65 Yale L J 390."

As set forth in 100 L. Ed. 404 at 408, Section 5(a) in regard to Costello v. United States, supra,

"The actual holding of the case was that an indictment cannot be challenged on the ground that it was based solely on hearsay evidence..."

There was no evidence before the Grand Jury of one or more of the essential elements of the charge of conspiracy to violate 21 U.S.C. 841: there was no evidence that defendant Bermudez agreed or was a part of any conspiracy, nor that he entered the conspiracy, nor that he performed any overt act in furtherance of the conspiracy to violate that law.

United States v. Falcone,
311 U.S. 205 ();

United States v. Torres,
503 F. 2d 1120 (2 Cir. 1975).

The indictment should be dismissed.

United States v. Costello,
350 U.S. 359, 364, 365 (1965);

Brady v. United States,
24 F. 2d 405 (8 Cir. 1928);

United States v. Farrington,
5 F. 343 (DCNY 1881).

Point III

There was no legal evidence to support the conspiracy count against defendant Bermudez.

The first count of the indictment charged defendant Bermudez with the crime of conspiracy to violate 21 U.S.C. Section 841() (). No overt acts were alleged in that count.

However, at the trial the Government offered testimony by a single witness, Manuel Fiffe, an alleged accomplice, that on the morning (719) of November 19, 1973 that defendant Bermudez came to the store, where Fiffe was employed, to buy clothing (711) and that at that time he told defendant Bermudez - out of the clear blue sky - a person he had seen only "several times" in the store as a customer buying clothing (710) - about having a "customer" to buy a 1/2 leilo of cocaine and 'could he obtain it,' (714-715) and that defendant Bermudez said that he could obtain it (715-718), that Fiffe and defendant Bermudez then went to the home of Victor Blanco "so that they could make an agreement" (718) and that in the afternoon of November 19, 1973 at 5:00 P.M. defendant Bermudez picked him up and went together to Victor Blanco's house (719). Fiffe testified that defendant Bermudez said that "the business could be done" (720) and that he (Fiffe) had nothing to do with that. Fiffe testified that Victor Blanco and defendant Bermudez "made an appointment to meet at the following day in Vivas' house" (720); on the other hand Fiffe also testified

that on November 19, 1973, that he, Fiffe, Bermudez and Blanco left Blanco's home and went to defendant Vivas' house (721-722) and met with defendant Vivas (722) whom he testified Bermudez introduced to him, and then testified that he already knew Vivas from Diaz-Martinez having introduced Vivas to him "approximately one month earlier" (723).

This testimony was elicited almost entirely, question by question, by improper, prejudicial leading questions, over futile objections by counsel (708-723).

The testimony of Manuel Fiffe was not corroborated in any part by any evidence, testimonial or otherwise.

The Government had full control of Victor Blanco and did not produce him to give any testimony on this or any other issue.

On the contrary, the Government stated at the end of the direct testimony of this witness Manuel Fiffe, that the Assistant United States Attorney had interrogated Victor Blanco in the presence of Special Agent Barry Abbott, after Victor Blanco had agreed to take a plea in this case, and that Victor Blanco stated that he could not testify that any such meeting occurring on November 19, 1973 and that he could not recall any such meeting ever having taken place.

The Government which had agents in constant surveillance of both Fiffe and Victor Blanco in that period did not produce a single agent to corroborate any aspect of this testimony of Fiffe, neither that Bermudez came to

who testified that throughout the time he was on the telephone that Abbott was sitting on a couch about four or five feet away with Victor Blanco and never came near him. The testimony of Abbott was impeached not only as to this but as to his "ability" to identify cocaine by mere observation, which he testified to on direct and which he conceded on cross examination that he could not do ().

Point IV

✓ The introduction by the Government of improper prejudicial testimony requires a reversal of the conviction

During the course of this trial the Government by improper leading questions, (which procedure had been repeatedly objected to and overruled by the trial court) elicited testimony from its witness Manuel Fiffe over repeated objections (681-683, 695, 710-714, 714-723) that he Manuel Fiffe "sniffed cocaine" with defendant Bermudez and with defendants Bermudez and Diaz together and with Victor Blanco on "a few occasions." That testimony was dragged into the trial even though it had no probative value as to the issues on trial, for the obvious purpose of inflaming the jury and smearing and destroying the character of defendant Bermudez, and labelling him and showing him to be a bad person, a drug addict, a law violator, a possessor and user of cocaine, a person having an easy familiarity with cocaine that he would "sniff cocaine" and that if he "sniffs cocaine", he would "deal" in cocaine

and thus would conspire to "deal" in cocaine, and would possess cocaine. The only purpose for the introduction of this testimony was to harm and improperly prejudice the jury against defendant Bermudez.

Defendant Bermudez had not testified as of then.

Defendant Bermudez testified that he did not drink liquor except on special occasions; that he did not even smoke cigarettes, that he was a family man - and worked steadily for the Marriott Corporation and performed much overtime work to earn a living for his family. Defendant Bermudez testified that he had been working since he was 15 years old. He testified that he had never been convicted of any crime. Indeed, he had not been in conflict with the law prior to this very case.

Character witnesses presented by defendant Bermudez testified to his good habits and honesty and law-abiding qualities.

After objections by counsel, the trial court stated that this testimony was not offered in regard to the conspiracy count but only to show that Fiffe could identify cocaine (682). However, the Government did not make that statement or representation (682). The Government remained silent (682) but it should have spoken.

See, *Napue v. Illinois*,
360 U.S. 264 (1959);

Giles v. Maryland,
386 U.S. 66 (1967).

It is urged that the testimony as to "sniffing" "with" Bermudez, and "with" Diaz, and "with" Blanco, was not for that purpose. It would not be necessary at all to allege that defendant Bermudez "sniffed" cocaine with government witness Fiffe, or that Bermudez on November 19, 1973 - an important date that the government contends that Bermudez "entered" the conspiracy - furnished the "cocaine" that Fiffe "sniffed" () if the purpose of the Government was to qualify Fiffe as an "expert" to identify cocaine.

This argument fails in view of Fiffe's own testimony.

On cross-examination Fiffe admitted that he could not remember any of the occasions that he "sniffed" cocaine (769), "none", he admitted (770).

On cross examination Fiffe testified that when he "sniffed" cocaine "nothing" happened (802), that there was no reaction He did not testify to getting high, or anything like that, on the contrary, he testified that "nothing" happened (802)7. On cross examination Fiffe testified that the only thing was that he smelled "ether" and that he tasted it through his nose (804) and that it had a "bitter" taste (806) and no other sensations, "nothing else" (807). Fiffe testified on cross examination that he could not identify cocaine by mere observation of it (777, 778) and that he had no test for identifying cocaine (802), just smelling it and nothing special happens (802). Thus, if the Government was introducing that "sniffing" testimony for qualification pur-

poses, it was far wide of the mark; Fiffe could not be qualified and he was not qualified to identify cocaine. As noted above, on cross-examination he admitted he could not remember any of the occasions when he allegedly "sniffed" "cocaine" (769, 770).

On cross examination of Fiffe by counsel for Diaz, Fiffe testified variously that he did not remember when he first "snorted cocaine", (850), then he testified it was "seven or eight months ago" (850) which would make the date February, 1974, then he testified it was "seven or eight months ago" "counting from the date of my arrest" (851) on June 21, 1974, which would make it October or November, 1973, then he testified it was "approximately six or seven months prior to November, 73" (852), then he testified it could be April, 1973 (852). Fiffe also testified on cross examination that he used cocaine only on the occasions that Government Agent Barry Abbott furnished it to him and invited him to use it (855).

The Government used this testimony of Fiffe that defendant Bermudez "sniffed cocaine" to argue that Bermudez was a bad fellow and thus that he was in the "conspiracy" (1673, 1674).

The intrusion of this testimony was prejudicial and requires reversal of the conviction.

Kotteakos v. United States,
328 U.S. 750 ().

Faky v. Connecticut,
375 U.S. 85 (1963).

The testimony by Fiffe and Abbott was a fabrication that should have been well known to the Government.

The contradictions and inconsistencies in the testimony of Abbott and Fiffe show this.

The introduction by the Government of improper prejudicial testimony of matters which were outside of the issues on trial was not an accident, or unavoidable. On the contrary, the record shows that this was the deliberate tactic of the Government to prejudice the defendant Bermudez to show "bad character on criminal disposition of the defendant" (October 15, 1974, 19A).

The Government's tactics in this trial was to try this case by leading questions to its witnesses () notwithstanding the repeated objections of counsel, which were repeatedly overruled by the trial court who made it plain that he would allow the Government's case to go in that way (715-718, 740-742).

On the very first day of this trial, the Government brought up that it intended to introduce testimony that the defendant Vivas had possession of marijuana (October 15, 1974, 16A-22A). The trial court made it clear to the Government that such testimony would not be admissible under Deaton if "it is designed solely for the purpose" of showing "the bad character or criminal disposition of the defendant." (October 15, 1974, 19A). The Government represented to the court and counsel, as to that matter, that it

would not introduce the evidence then being discussed. That was a tacit admission of the applicability of the rule to the evidence proffered by the Government.

The Government by that colloquy and instruction from the trial court was put on notice of the rule of law. Yet, heedless of that rule of law and the warning of the trial court, the Government went ahead and deliberately called for the introduction of testimony from its witness agent Barry Abbott, again by leading questions by which this prosecution was tendered to the court and jury, and from its witness Manuel Fiffe ().

The Government deliberately and by improper leading questions elicited testimony from Agent Abbott that he "discussed" purchasing 300-500 pounds of marijuana with defendant Bermudez on the evening of November 20, 1973 at the Estrella Record Shop (304). The introduction into this case of the alleged crime of dealing in marijuana was without probative value on the issues of this case and was deliberately introduced by the Government for the purpose of creating prejudice in the minds of the jury against the defendant, Bermudez that he was a person with a propensity for drug dealing and law violations, so that the jury would more readily return a guilty verdict against him regardless of the facts on the issues before the jury (315, 331-332).

The defendants moved for a mistrial (304) which was denied. ()

The trial court gave instructions to the jury in response to the objections of counsel ().

However, the trial court's instructions served to increase the damage and prejudice to the defendants, to wit:

"The Court: Now I ruled that the questions and answers to questions relating to some talk about marijuana were totally irrelevant to the charge in this indictment. And I advised the United States Attorney that it was improper to develop the testimony as to those conversations.

The defendants are here ready to defend in this indictment and I'll just ask you to strike it from your consideration and your minds, just as I have directed the court reporter to strike it from his recording."

Now you can go on, Mr. Kimmelman, from there." (335)

The Trial Court's instructions that it was "improper to develop this testimony as to those conversations" had the obvious effect of confirming that those conversations occurred, but that they were not a necessary element to the proof required on the charges before the jury. The jury was left with the same bad impression of these defendants even if they were instructed not to consider "dealing" in marijuana as an element of the crimes charged here. The damage and prejudice to the defendants was to their nature and character as persons who have an familiarity with drugs in large quantities and as law violators. That was the damage and the wrong that the trial court did not address itself to or correct.

The trial court showed that it would hear no more on the subject (335) after hearing long objections previously (305-335).

The Government's tactics were unfair and wrong. The Government's tactics improperly prejudiced the defendant

Bermudez and require a reversal.

Kotteakos v. United States,
328 U.S. 750 ().

Point V

The trial court's allowance of the Government to question the character witnesses of defendant Bermudez that he had been arrested on a marijuana charge was groundless and was prejudicial error.

The defendant Bermudez presented three character witnesses: Reverend Ippolito Malendez (1158), Alcira Gaitan (1201) and Mercedes Gaitan (1206). On cross examination the Government sought (1167) over defense objections, (1167-1197) to put a question to each witness whether they knew that the defendant Bermudez had been arrested on a marijuana charge. The trial court allowed the Government to put the following question to each character witness, e.g.:

"Q. Father (Melendez), have you heard that Eduardo Bermudez was arrested in New Orleans on June 7, 1974 on a marijuana charge?" (1197)

The trial court instructed the jury after that question was put to that witness by the Government (1198). The effect of that instruction was to imbed in the minds of the jury that the arrest happened, and that if the witness did not know about the arrest of the defendant then he could not really know the defendant or his reputation for which he had been offered as a witness by the defendant. The instruction was confusing. The fact that the defendant answered

that he did not know of the alleged arrest, under the instruction, reduced him as a character witness.

That this was the effect and result is seen from the question by the Government of the witness whether he had heard that the defendant Bermudez had been arrested on the charge on trial, to which the Reverend Melendez answered no. (1199) That question carried with it the plain implication that defendant Bermudez had in fact been arrested for a crime involving marijuana. This question alone and coupled with the gratuitous introduction by the Government of other marijuana testimony against the defendant Bermudez () was intended by the Government nad had only the purpose and effect to show that the defendant Bermudez was predisposed to criminal acts and to dealing in drugs and was a bad person and a law violator, to improperly counter the fact that the defendant was a hard working good husband and father with no criminal record whatever and no evidence of any criminal activity.

The question was allowed to be introduced into the case on the bare representation to the Court by the Government that the defendant had been arrested in New Orleans on a marijuana charge (1169-1171).

The trial court accepted the bare unsworn representations of the Government against the specific contrary representation by the attorney for defendant Bermudez and against the sworn testimony of defendant Bermudez.

At that time the defense counsel did not know that there was documentary evidence in the file of this case which established that the defendant was arrested on a warrant filed on this indictment ().

That documentary evidence is a copy of the docket entry of Magistrate Sears (Eastern District of Louisiana) under the file number 74-146M dated June 7, 1974 to wit:

"Defendant appeared before Magistrate Sear on a warrant issued in the Eastern District of New York at Brooklyn. Defendant informed of charge and advised of rights. In lieu of posting \$250,000 cash bond defendant remanded to custody of U.S. Marshal. Defendant signed waiver of removal hearing (MLS)".

There was therefore no basis for the trial court to have allowed that prejudicial, demeaning and distracting question to the character witnesses and to be spread before the jury to raise unfounded questions in their mind against the defendant Bermudez.

The defendant Bermudez was deprived of a fair trial by this improper and prejudicial question.

Because the Government had been allowed by the trial court to put this type of question, the defense was compelled to put this question to the character witnesses (1208) in order to somehow lighten the resulting prejudice from the introduction of this unfounded and extraneous matter that had no probative value and only served to improperly prejudice the jury against the defendant Bermudez.

It is submitted that the trial court's later charge

to the jury (1726) that they were not to assume that defendant Bermudez was arrested if the character witnesses said no that they had not heard Mr. Bermudez was arrested on a marijuana charge, did not remove the prejudice created in view of the fact that the question should not have been asked at all, that the trial court's initial charge did not remove the damage (), and the trial court left it to the jury whether the character witnesses were telling the truth whether they had heard that Bermudez had been arrested on a marijuana charge. (1726).

This question is to be added in its improper prejudicial effect to the questions as to "sniffing" and "marijuana" referred to above, at Point IV.

Point VI

The trial court committed reversible error in its repeated allowance of hearsay testimony.

That the trial court over repeated objections allowed Government witness Abbott to testify that Victor Blanco "translated" his statements in English to Fiffe and Fiffe's statements in Spanish to Blanco notwithstanding it was hearsay and offered for the truth of that testimony in the face of the testimony by Fiffe that he did not understand or speak a single - not one word - of English, () and in the face of the testimony by Abbott that the totality of his knowledge of Spanish was four words: "cuanta", "cuando", "muy bien", and "adios", and his testimony that he did not know what was

being said in Spanish or if it was in fact a "translation".

The testimony of Abbott and Fiffe were in conflict as to what was allegedly said. Victor Blanco, the so-called "translator" did not testify, notwithstanding he was in the control of the Government.

The Government elicited testimony by improper leading questions of Agent Abbott that Victor Blanco spoke in Spanish to Bermudez at the Estrella Record Shop on the evening of November 20, 1973 and that thereupon Victor Blanco said to Abbott, "you don't have to worry about anything. He is the boss. He's okay" (302)

That was offered as the translation of the conversation allegedly between Bermudez and Blanco and was offered for the truth of the statement (302,) that Bermudez was the "boss".

Bermudez had not spoken to Abbott at all. (See, Bermudez testimony). The statement was not the statement of Bermudez. Bermudez could not speak or understand English, so that even if Blanco said what Abbott claims he said, - Blanco was not produced by the Government - still it would not be admissible against Bermudez. It was inadmissible hearsay and was not within the rule of adoptive admissions since Bermudez could not be deemed to have adopted something he could not understand (if it was said).

Furthermore, this incident was not testified to by Fiffe. Fiffe did not support the testimony of Abbott. Abbott

testified that Fiffe held out his hand and spoke to Blanco in Spanish and that Blanco told Abbott that Abbott should shake Fiffe's hand "so that Bermudez would know that Fiffe and I were friends and did business together before. So I said sure, and shook Fiffe's hand" (303). Fiffe did not give any such testimony. On cross examination, Abbott conceded that shaking hands had no special meaning and meant what everybody understands it generally to mean - a mere greeting - and not that "we're friends and did business together before." (303).

The trial court committed reversible error in the admission of testimony that on November 20, 1973 at Victor Blanco's apartment he telephoned to Bermudez' house and spoke to a lady whom he did recognize and she told him that defendant Bermudez was at "Vivas' house". (723-727) This testimony was admitted over repeated objections (723-727). The testimony was material and highly prejudicial. It served to connect the innocent presence of defendant Bermudez at the Estrella Record Shop on November 20, 1973 to the presence of Fiffe, Blanco and Abbott.

Point VII

The trial court committed numerous and repeated errors in the admission of testimony whose effect was substantially prejudicial to defendant Bermudez and deprived him of a fair trial.

The evidence against the defendant Bermudez can properly

be said to consist almost entirely of testimony from leading questions, non-responsive answers and inadmissible hearsay.

Only two witnesses gave testimony against the defendant Bermudez: Agent Abbott () and Manuel Fiffe. () (1674) The testimony of both of these witnesses was characterized by contradictions as to material matters within their own testimony and, as against each other's testimony. The testimony of these witnesses was uncorroborated and was impeached. Their testimony was discredited and incredible as a matter of law.

Point VIII

The ruling by the trial court that Agent Abbott was an expert and qualified to identify cocaine was prejudicial error.

The trial court over objections of counsel for defendant Bermudez allowed Agent Abbott to testify as an "expert" in the field of identification of cocaine, notwithstanding that there was no sufficient basis in evidence upon which to make that determination. That ruling resulted in the admission of testimony identifying substances as "cocaine" to the prejudice of the defendant Bermudez. The jury was allowed to hear testimony by this witness as an "expert" qualified as being able to identify "cocaine" by mere observation when chemists presented by the Government as witnesses

testified that "cocaine" could not be identified by observation and thus that there was no such qualification possible. The jury was thus misled in a major issue by the ruling of the trial court which was contrary to scientific knowledge. The fact that Agent Abbott on cross examination finally conceded that he could not identify "cocaine" by mere observation did not dissipate or eradicate the prejudice created.

Point IX

The refusal of the trial court to allow the government chemist to testify on the identifiability of cocaine by observation was error.

The Government had presented two witnesses , Fiffe (674-674) and Agent Abbott (187-193; 193-211) who were the vital witnesses against defendant Bermudez, as "experts" able to identify cocaine by mere observation without scientific laboratory testing. (193) These witnesses testified on direct examination that they could identify cocaine by mere observation.

These witnesses in varying degrees testified on cross examination that they could not identify cocaine by mere observation (777, 778; 439-445) (417-430). On the other hand, Government Agent Abbott testified he could identify by observation "Boric acid, lactose, cocaine". (444)

Nonetheless, their testimony that they could was still before the jury. It was important therefore to establish that

the testimonial claims of these two witnesses to be able to identify cocaine by observation was shown to be scientifically impossible.

The trial court had shown that it believed that identification of cocaine by observation was possible by experience and indeed was fully persuaded it was so. (433) (430-430).

The Government presented two chemists as experts on cocaine identification. One of these experts was witness John Sawinski (1044-1098). The following questions, among others, was asked of this witness (1094):

"Q. Would you claim that you could look at a mass of white powder and from that observation say that there is or is not cocaine in that mass of white powder?

A. I would never claim that.

Q. It is simply not possible, is it?

Mr. Kimmelman: Objection.

The Court: Sustained."

It is submitted that the question was valid and that the witness should have been allowed to answer. It is submitted that the refusal of the trial court to allow the witness to answer was reversible error and caused substantial prejudice to defendant Bermudez affecting the verdict rendered. The importance of this question is emphasized by the fact that counsel for defendant Bermudez had objected to Government witness Abbott's testimony on this issue because it was

"physically impossible and chemically impossible" (190-191). Government witness Weber who was presented by the Government as an expert in identification of cocaine had testified on this subject.

Notably, the Government represented to the trial court that Agent Abbott was not being offered as "an expert of some kind", but "just general experience" (188). Nonetheless, the Government elicited responses allowable only for an expert and nonetheless the trial court admitted his responses as an expert (193).

The trial court had allowed the Government to elicit testimony from two lay witnesses, Fiffe and Agent Abbott, that they could identify cocaine by mere observation. That was error. It is submitted that the admission of that testimony by those witnesses was on a par with admitting testimony by a lay witness that the moon is made of blue cheese and their refusing to admit testimony by lunar scientists as to what they have learned as to what the moon is made of.

It was unfair to defendant Bermudez to leave the jury with the testimony of Government witnesses Fiffe and Abbott that it was possible to identify cocaine by observation. The defendant Bermudez was charged with possession of cocaine on November 20, 1973 under count 6 of the indictment. The Government did not possess any sample of that alleged substance and of course no chemical tests were performed to

identify it. The identification of the alleged substance was solely based on the testimony of these two Government witnesses, Fiffe and Abbott, which was based on "observation". The events on November 20, 1973 as claimed by the Government were also essential to the determination of the conspiracy count under the charge to the jury and in view of the omission of the indictment to charge an overt act.

The judgment of conviction should be reversed.

Point X

The midtrial charge to the jury on conspiracy was erroneous and prejudicial.

During the direct testimony of Agent Abbott the trial court gave a charge on conspiracy (212-216) which was prejudicially erroneous (216-219). As a result of objections (216-219) the trial court instructed the jury to disregard his charge and read out another charge on conspiracy (219-224).

The first charge was erroneous and prejudicial since it failed to instruct the jury that the essence of the conspiracy charge before them was agreement by defendants to violate 21 U.S.C. Section 841(a) as charged. The trial court described the conspiracy charge by analogy to a grocery business (212-). The trial court, however, also erroneously charged the jury that a partner in the grocery business selling only 3 cans of corn a month would be bound by his

partner's purchase of 500 cases of canned corn even if the partner knew nothing about it and as a matter of fact opposed it (214) (216). The trial court also charged the jury that mere "conversations" could be a sufficient basis to find a conspiracy and to find that a defendant became a member thereof.

The reading of a conspiracy charge by the trial court was unrelated to the indictment in this case and unrelated to the testimony of this case (219) and served to confuse the jury by its generality and profusion of principles without reference to facts.

The jury later showed its utter confusion with the conspiracy count under the various conspiracy charges given by the trial court by its repeated requests for instructions on the conspiracy count while it was deliberating ().

One of the obvious objections to the charge as read by the trial court was that portion (among others) which recited the following (221):

The indictment did not charge any overt act and did not recite any means or methods by which the "conspirators" had "agreed upon to be used in an effort to effect or accomplish some object or purpose of the conspiracy as charged in the indictment."

Then after reading this long charge, unrelated at that time to the trial evidence, the trial court stated:

"Now I gave you that because I wanted you to know how to treat evidence of conversations or acts out of the presence of the accused. I will read that charge." (221).

Thereupon the trial court read a charge to the jury which presupposed and was premised upon the existence of a conspiracy and a defendant's participation therein (221-222) and charged that testimony of statements made outside of the presence of a defendant was admissible against a defendant even if he was not present and did not know about them.

The trial court, while charging that the acts or declarations of "one conspirator" outside of his presence without his knowledge are not admissible against a defendant unless proved to be a member thereof beyond a reasonable doubt, the charge to guide the jury in deciding whether a defendant entered a conspiracy was not only given in general terms which again served only to confuse the jurors.

No further opportunity to make objections was allowed by the trial court (224).

Point XI

The introduction by the Government of false testimony by Fiffe and Abbott deprived defendant Bermudez of a fair trial.

The testimony by Manuel Fiffe as to alleged incidents occurring on November 19, 1973 which allegedly involved defendant Bermudez was false. The statement of Government (734) regarding this testimony indicates a knowledge of the questionable character of that testimony which obliged the Government not to present it.

That testimony of Fiffe poisoned the well and deprived

the defendant Bermudez of a fair trial.

See, Brady v. Maryland,
373 U.S. 83 ();

United States v. Basurto,
497 F. 2d 781 (9 Cir. 1974).

Point XII

The trial court cut short the deliberations of the jury and coerced a verdict.

The trial court completed its charge to the jury on the afternoon of Thursday, October 24, 1974 at 5:35 P.M. (1755). After the jury withdrew from the courtroom, the trial court heard objections to the charge (1755-1763) and called in the jury at 5:46 P.M. at which time he informed them that he was excusing the jury for the night to return tomorrow, Friday, October 25, 1974 at 10:00 A.M. to resume deliberations (1765). The jury duly resumed its deliberations on Friday, October 25, 1974. At 4:15 P.M. on Friday, the jury sent a note to the trial court requesting information (1768), which was given and the jury was excused. Thereafter at 5:02 P.M. (1769) the jury sent out a note:

"A written charge of what is a conspiracy."
(1769).

The trial court, after conferring with counsel on this point, (1769-1770) received another note from the jury asking for further information (1769). The trial court decided that he would not furnish the jury with a written charge on conspiracy (1770-1771). Counsel for defendant Bermudez had objected

(1769). The trial court instead read (1771-1775) from his original charge to the jury which he had given on Thursday, October 24, 1974 (1711-1755) (1739-1744) almost verbatim (1775-1776). The jury withdrew at 5:40 p.m.. Within ten minutes, at 5:40 P.M., the jury sent out a note stating

"We are unable to reach a decision." (1777).

At 5:51 P.M. the jury entered the courtroom.

The trial court at that time informed the jury that he did not think that they had "deliberated on this long enough (1777-1779):

"The Court: I have your note saying you are unable to reach a decision, but I don't think you have deliberated on this long enough. This was almost a week's trial and I would like you to continue to deliberate. You do not have to arrive at a unanimous verdict as to all the defendants on all the counts or both counts. If you have arrived at a unanimous verdict as to any defendant on any count you may report that. I would like you either to go back and deliberate tonight or come back tomorrow morning.

If you think there is a possibility of reaching a verdict tonight I would suggest you continue.

You tell me in a note what you want to do. The lawyers spent a lot of time in preparing and it was a long trial. If you fail to agree it just means that the lawyers will have to do the work all over again and there is no reason to suppose that any other jury is going to be of better quality and decide it differently than you. I think it is important that you make an effort to come to a verdict, if you can, based on the evidence.

Suppose you retire to the jury room and tell me what you want to do. If you feel you can arrive at a verdict as to any one defendant as to either count, whether you think it would be helpful to continue tonight, but if not, whether you feel it

is better to come back tomorrow morning."
(1777-1779).

The jury withdrew at 5:55 P.M.

Counsel for the defendant Bermudez objected to the charge as coercive (1779):

"Mr. Sutton: I respectfully would except to your Honor's reference to the long time that the attorneys have prepared for the trial and the time we have spent. I think that might have been a pressure upon these jurors to arrive at a verdict that they may not want to arrive at."
(1779).

About twenty minutes later, at 6:15 P.M. the jury sent out another note, (1779) that 'we are staying tonight' (1779). The trial court at that time, out of the presence of the jury, stated that he had decided to excuse the jury by 7:00 P.M. if they had not arrived at a verdict by that time; he stated, he was not so informing the jury

"because if I do they might feel compelled, there might be a claim they were compelled to arrive at a verdict." (1779)

At 6:50 P.M. the trial court received two notes from the jury: one was a request by one juror to notify her husband, the other was a request for information: "How did the cocaine arrive at the record store according to Fiffe direct and cross." (1780)

Abbott had testified that on November 20, 1973 at the Estrella Record Shop owned by Mrs. Vivas defendant Vivas had gone out without a leather coat, and had returned wearing a leather coat and had brought in a package of alleged cocaine

and threw it on the table in the back room.

Fiffe on the other hand had testified that some other unidentified man had come into the back of the store while Abbott, Bermudez, Vivas and he were there, had looked around, spoke to Bermudez and Vivas and walked out. Then, five minutes later walked back in with the package of alleged cocaine. (1781-1782) (728-729).

The variance in testimony as to this alleged incident is of course plain and extreme. And it should be borne in mind that the government had prepared both witnesses.

In respect to the testimony of Fiffe as to November 19, 1973 which the Government offered to establish the entrance of Bermudez into the alleged conspiracy, the Government conceded that Victor Blanco, their available witness, had stated that no such events occurred on November 19, 1973 (See Point).

The trial court at about 7:00 P.M., after reading the testimony requested by the jury, informed the jury that he was suspending at that point and that the jury was to return tomorrow, Saturday, October 26, 1974 at 11:30 A.M. and requested the jury to give him their "thoughts on it" (1783).

The jury sent out a note to the court: 'we will come back tomorrow' (1783). The jury reentered the courtroom at 7:02 P.M. and was excused for the night. (1783-1784).

The jury convened at 12:15 P.M. on Saturday, October 26, 1974 and was excused for further deliberations (1787).

At 1:40 P.M. the jury requested further trial information (1787) which was furnished (1789-1791). The jury withdrew from the courtroom at 2:15 P.M. (1791).

At 3:50 P.M. the jury sent out a note:

"Charge, what is a conspiracy?"(1792).

The jury reentered the courtroom at 3:51 P.M.; at that time the trial court gave the jury additional instructions on conspiracy (1792-1797). The jury withdrew at 4:03 P.M. While the attorneys were on their feet to object to the charge of the trial court (1799) the jury sent out a note that it had reached a verdict. The jury reentered the courtroom at 4:05 P.M., a total of two minutes to go out, deliberate, prepare the note, inform the marshal by knocking on the jury room door, delivering the message and returning to the courtroom. (While the record does not show this fact, the knock on the jury room door, which was heard in the courtroom, occurred less than one minute after the jury was in the jury room.)

It is respectfully submitted that the trial court showed a plain impatience with the jury, its repeated requests for instructions as to "what a conspiracy is", and its failure to have reached a verdict.

On Friday, the trial court showed its impatience with the failure of the jury to have arrived at a verdict, after he had repeated the charge on conspiracy (1770) and still the jury had reported that it could not reach a decision ()

by telling the jury that it was a long trial and "if you fail to agree it just means that the lawyers will have to do the work all over again and there is no reason to suppose that any other jury is going to be better in quality and decide it differently than you. I think it is important that you make an effort to come to a verdict, if you can, based on the evidence." (1777-1778).

It is respectfully submitted that this charge was coercive and prejudicial to the defendants.

This charge, taken together with the final charge to the jury on Saturday morning was greatly coercive and the plain fact is that in less than one minute this jury which had repeatedly stated it wanted to know 'what a conspiracy was', returned a verdict of guilty to the conspiracy count and not guilty to the substantive count ().

United States. Contreras,
463 F. 2d 773 (9 Cir., 1972);

United States v. Brown,
411 F 2d 930 (7 Cir. 1969);

United States v. De Stefano,
476 F 2d 324, (7 Cir., 1973). (332-338)

The cold print of language shows that the trial court was impatient with the jury "...there is nothing mysterious about it" (1796)

"...Now, as I say, if the Government proves all the four elements essential to this crime beyond a reasonable doubt then you must find the accused guilty. If you find they have not proved all those elements then

find them not guilty." (1797)

The trial court plainly told this jury to do one thing or the other, but do it.

The trial court then added its final pressure through which its impatience with the jury showed through: (1797)

"Again, I hope I have explained it. I know coming into court as a jury for the first time, it is not an easy concept. But, we have been here now for two weeks and this is the third or fourth time I explained it to you. I hope I got it across." (1797).

The effect of this charge alone and as well as cumulatively with the charges given on Friday, was explosive on the jury. The will of the jury to deliberate further was immediately and totally overcome. The jury rendered a verdict within less than one minute after arriving into its jury room. The sequence of these facts speak clearly of the effect the trial court's instructions had on the jury.

The jury's verdict showed that it did not believe the testimony of the government witnesses regarding the charged events of November 20, 1973 which was the substantive count, count 6 of the indictment. As noted in Point that substantive count had been the only basis for the conspiracy count, as admitted on the record by the Government.

The testimony of Fiffe, who was not believed by the jury on the substantive count was the only testimony implicating defendant Bermudez in any possible allegation of conspiracy: It was the only testimony upon which the Government

relied to prove the charge of conspiracy as to defendant Bermudez.

The Government itself conceded (but not before the jury - the jury was not enabled to hear this information; See Point) that Fiffe's testimony (702-704, 711-712) was denied by Victor Blanco who was supposedly there according to Fiffe (); Victor Blanco said the November 19, 1973 claims by Fiffe never happened (). Defendant Bermudez himself took the stand and denied that such events occurred (). Fiffe's own testimony on cross examination contradicted his testimony that the alleged events with Bermudez on November 19, 1973 had occurred.

Fiffe testified (by way of leading questions) that on November 19, 1973 Bermudez came to the store where he worked and then went to Victor Blanco's apartment with Bermudez, then went to "Vivas' house" with Bermudez and met Vivas (). On the other hand, on cross examination Fiffe testified that prior to November 20, 1973 that he did not see defendant Bermudez except in the store in regard to his buying clothes (759, 748).

Fiffe testified that he had seen Bermudez "on several occasions" at the store when he came with his wife and daughter to buy clothes (752, 754). Bermudez testified that he had gone to the store to buy clothes at cheap prices on the recommendation of his co-worker - El Gordo - at the Marriott Corporation, who vouched for him and came with him and his

wife and children the first time to show him the way; that he only went there with his wife and child two more times, after that () for a total of three times, and that the last time was in August or September, 1973().

Government witness Fiffe testified on direct examination (702):

"Q. After November 12th did there come a time when Victor Blanco approached you about doing a further deal with Barry?

A. Yes.

Q. What did Victor Blanco say to you?

A. That Barry was interested in half a kilo of cocaine.

Q. Do you recall the date that Victor Blanco told you that Barry wanted half a kilo of cocaine?

A. November 19th approximately.

Q. What did you tell Victor Blanco?

A. That I would see if Israel Martinez had that quantity." (702)

Government Agent Barry Abbott on the other hand on direct examination testified that after November 12, 1973 he did not hear from Victor Blanco or speak to Victor Blanco until the afternoon of November 20, 1973, (290).

On the other hand, Government witness Miranda testified that after November 12, 1973 "nobody else did anything else" (947).

Fiffe testified that Victor Blanco told him that Barry (agent Abbott) was interested in half a kilo (702). On the

other hand, Government agent Abbott testified that it was Victor Blanco who had called him by telephone and said to him

"The people in the factory had new uniforms" (290).

According to Abbott that "meant that there was a shipment of cocaine for my inspection" (sic) (underscoring added) (291). The government went to great lengths to show that in fact Agent Abbott never intended to buy a half a kilo of cocaine, but only to inspect it (291, 382-384). Abbott testified that when he saw Victor Blanco at his apartment that Fiffe was there and that he told Blanco that he, Abbott was interested in purchasing "another eighth" (292). According to Abbott, nothing was said by him about purchasing a half a kilo (292). Abbott testified on direct that it was Blanco who told him on the afternoon of November 20, 1973 that

"Fiffe only wanted to deal in quarters or half kilo packages" (294).

Abbott testified that he told Blanco to tell Fiffe that

"I didn't want to spend money for a quarter or a half kilo package to get relatively low purity cocaine" (295).

Abbott testified that he told Blanco to tell this to Fiffe and that Blanco told him that with a larger quantity he would set a higher quality (295). Abbott testified

"So Blanco spoke to Fiffe. They had a conversation. And Blanco said to me that Fiffe had a man who had a half kilo of high quality. I asked Blanco if Fiffe thought it was possible

for me to purchase an eighth from this half kilo package. And Blanco said "I will ask him."

Abbott makes it clear that he was never looking to buy a half a kilo.

Abbott did not testify that Blanco told him that Fiffe gave any answer to his question about an "eighth" (296).

The next piece of testimony is a sharp turn into a non-sequitur which conveniently leads into bringing in defendant Bermudez into the story.

Abbott testifies next that Fiffe made a telephone call on "Blanco's telephone...located on his dresser" (296). Abbott testified that while Fiffe was telephoning he walked over and stood over Fiffe, looked over his shoulder and read a telephone number which Fiffe allegedly had laying on the dresser (296-). That telephone number, according to Abbott, he immediately committed to memory, he did not write it down anywhere () and it turned out to be Bermudez' telephone number.

During the course of Fiffe's alleged telephone conversation, Abbott testified that he

"Instructed Blanco to tell Fiffe to tell his man that I did not have enough money with me to purchase a half kilo and that I was only going to inspect the package that night. Blanco said he would tell Fiffe this...Fiffe spoke to Blanco and told me that an appointment had been set up for me to inspect the package at a nearby business later that evening.... He said it was made for about 6:30." (297).

Abbott testified that he then left the Blanco apartment telling Blanco and Fiffe he would return by 6:00 P.M. and they would go from there (297). Abbott testified that about 6:15 P.M. he returned to Blanco's apartment, then Blanco and Fiffe and he left together. Blanco went in Agent Abbott's car. Fiffe allegedly led the way (298).

According to Abbott the arrangements for the half kilo inspection event were first made on the afternoon of November 20, 1973 from Blanco's apartment where Fiffe telephoned someone and he allegedly saw a telephone number which was Bermudez' number.

At no time does Abbott testify that anyone told him that Bermudez was the person whom Fiffe telephoned. At no time did Abbott testify that anyone told him the name Bermudez.

Abbott's testimony regarding his "discovery" of a telephone number of Bermudez on the dresser of Blanco's apartment while Fiffe was testifying founders and sinks away from sight by the testimony of Fiffe who testified that throughout the time that Fiffe had allegedly used the telephone in Blanco's apartment, Abbott was sitting on a couch next to Blanco, four or five feet away from Fiffe (800-801).

Yet the damage was done by this false testimony.

If there had been an appointment made the previous day on November 19, 1973, why the telephone call from Blanco's apartment on the afternoon of November 20, 1973.

The damage was caused by the improper hearsay testimony by Fiffe that on November 20, 1973 at Blanco's apartment he telephoned to Bermudez' house and spoke to a lady whom he did not recognize and she told him that defendant Bermudez was at "Vivas' house". This testimony was admitted over repeated objections (723-727). The testimony was material and highly prejudicial. It served to connect the innocent presence of defendant Bermudez at the Estrella Record Shop owned by Carmen Vivas to the presence of Fiffe, Blanco and Abbott.

That the testimony Fiffe gave was fabricated and convenient is seen throughout. Another instance was the testimony of Fiffe on direct examination (by leading questions) that Fiffe never called or contacted, or attempted to contact defendant Bermudez after November 20, 1973 (730). The Government was not satisfied with this answer since it did not fit its program. So the Government persisted in leading questions and elicited the desired testimony from Fiffe, which was just the opposite of what Fiffe had just testified to. Fiffe, by leading questions testified that he received a telephone call from Victor Blanco the next day on November 21, 1973

"to find out whether the sale could be made around 4:00 P.M. when the customer was supposed to come" (731).

If there was such an arrangement between Fiffe and Abbott, only Blanco could have made it with Fiffe, since Fiffe could not speak English and Abbott could not speak Spanish. Abbott gave no testimony of any such arrangement (). Fiffe testified that after the Blanco telephone call to him

on November 21, 1973 that he (Fiffe) telephoned defendant Bermudez and spoke to him and "told Bermudez that Victor (Blanco) had told me that the customer was going to come at 4:00 P.M. that afternoon" (731):

"Q. What did Bermudez say?

A. He answered me that he had already spoken to the person (?) and there was no business to be done because the cocaine had already been sold, all of it. And approximately one hour later I received a phone call from Victor Blanco" (731) (Matter in parenthesis and under-scoring added).

Here we have Fiffe first testifying that the sequence of alleged events on November 21, 1973 was that Victor Blanco called first, (731) then in the immediately succeeding testimony Fiffe testifies that it was after he spoke to Bermudez and after Bermudez allegedly told him that the cocaine was sold, that Victor Blanco called (731).

The elaborate scheme to implicate Bermudez hinges on the alleged inability of Diaz to supply 1/2 kilo of cocaine for the demands to buy of "customer" Barry. As noted above, Barry Abbott testified that he did not make any such demands.

The testimony of Agent Abbott is that Victor Blanco told him

"that four kilos of the last shipment had already been sold and that the man who controlled the shipment had received twelve kilos" (260).

That was allegedly on November 8, 1973 (249). That meant that as of that date, Blanco or Fiffe had 8 kilos available to them. On the other hand, Abbott also testified that

"...Blanco told me that an eighth of kilo of this cocaine was left and would be available for purchase." (255)

The problem with the government witnesses' testimony was that it constantly changed materially to fit some purpose, or some thought realized at the moment as a means to damage a defendant.

The reality is that the scheme to implicate Bermudez is founded on false testimony.

On direct examination Fiffe testified that he never sold any cocaine for anyone other than Diaz Martinez (683):

"The Court: ...The question is did you sell cocaine for anyone else other than Israel Diaz Martinez? Yes or No?

The Witness: No." (683).

Fiffe on cross examination testified that he did not tell agent Abbott that he had other sources of cocaine from different people:

*

"Q. Did you sell Agent Abbott in December *(should read November) of 1973 that you had other sources of cocaine from different people?

A. No.

. . .

The Court: ...Did you have any conversation with anyone concerning the price of the half a kilo?

The Witness: No." (885)

While at the trial the following was stricken as non-responsive on motion of counsel for Bermudez:

"The Court: . . . Didn't you tell us that Victor Blanco was only an acquaintance of yours?

A. Yes, I had already known him. I had seen him several times at the store and when he came and asked for half a kilo, I asked Diaz." (888),

this testimony also shows how changing the testimony is as to the so-called half a kilo.

On cross examination by counsel for Diaz, Fiffe gave another version of this alleged half a kilo. In this version, Fiffe testified that he got the idea to talk to Bermudez on the spur of the moment (883-884) and that he did not speak to him alone, that he was at the store, meaning at the store it would not be a conversation alone with Bermudez (883). Then he testified that no one else was present when he spoke to Bermudez (883).

Bermudez testified that in all of the three times he was at the store he was with his wife and children and El Gordo the first time, and with his wife and one child the next two times (). Bermudez denied having any business with Fiffe other than buying clothes from the store ().

Fiffe testified that he participated in the alleged deal for half a kilo of cocaine as a favor to Victor Blanco (887), and that when Victor Blanco asked for a half a kilo, Fiffe asked Diaz (887-888). Notably, Fiffe testified on cross examination that he first met Victor Blanco "around September or October", 1973 (842).

The Government's theory as presented to the court and jury was that Abbott was buying a half kilo and that Fiffe and Blanco who were allegedly supplied by Diaz could not get that much from Diaz, so that Fiffe then called on Vivas and Bermudez on November 19, 1973 in order to get that large a quantity. By leading questions, the Government led Fiffe through his macabre dance of testimony to testify that he had never sold a 1/2 kilo before and that he had never seen Diaz sell a 1/2 kilo before either.

In the light of the testimony at the trial, (and of the above coercive charges of the trial court), the trial court's charge on accomplice testimony:

"The testimony of an alleged accomplice alone, if believed by the jury may be of sufficient weight to sustain a verdict of guilty, even though not corroborated or supported by other evidence.

Now, whether or not their testimony is corroborated or supposed by other evidence is a question for you to decide. But I am charging that even if Fiffe's and Miranda's testimony as alleged accomplices is not corroborated or supported by other evidence, their testimony alone is enough to support a verdict of guilty." (1732, 1733),

was prejudicial and plain error, requiring a reversal of the conviction.

See, *Faky v. Connecticut*, supra.

United States v. Cady,
495 F. 2d 742 (8 Cir. 1974);

United States v. Cole,
449 F. 2d 194 (8 Cir. 1971);
cert. den. 405 U.S. 931 (1972).

In view of the testimony of Government witnesses Fiffe

and Abbott and the other testimony in the case, the testimony of Fiffe was incredible and unsubstantial against defendant Bermudez, as well, as in view of the Government's admission that Victor Blanco had informed the Government that the events alleged by Fiffe as to November 19, 1973 did not occur.

The truth has been grossly mistreated and damaged in this case by the Government.

The implication of Bermudez in this indictment was contrived and fabricated.

It is plain that the trial court's errors caused substantial prejudice to the defendant Bermudez and that the conviction should be reversed.

Point XIII

The failure of the Government to produce Victor Blanco as a witness deprived defendant Bermudez of a fair trial and of his constitutional right to confrontation.

The Government witnesses, Agent Barry Abbott and Manuel Fiffe gave their testimony through Victor Blanco.

As set forth herein, Fiffe did not speak or understand English and Abbott did not speak or understand Spanish. However, each testified as to what was allegedly said and done through Victor Blanco, purportedly as the translator.

However, Fiffe testified that Victor Blanco did not translate for him (878-879) and Abbott testified that he did not know if Victor Blanco was in fact translating anything.

These facts are of importance throughout the trial, as well as to that single incident where Bermudez, who could not speak or understand English was present.

The Government's failure to produce Victor Blanco as a witness was a last minute decision, at least insofar as the defendants were informed. The Government did not disclose this tactic by the Government until which was long after the Government had disclosed to the trial court and counsel that Victor Blanco had informed the Government that the incidents which Fiffe had testified to regarding defendant Bermudez on the 19th day of November, 1973 had simply not occurred. Fiffe had testified that Victor Blanco was there on that day.

The failure to produce Victor Blanco at all prevented the vital Brady material, which plainly would have affected the jury in its verdict, from being presented to the jury. The defendants had no way to bring that information to the jury.

The judgment should be reversed.

Bruton v. United States,
391 U.S. 123 (1968);

Pointer v. Texas,
380 U.S. 400 (1965).

CONCLUSION

Judgment of conviction should be reversed and the indictment dismissed.

Dated: New York, N.Y.
April 28, 1975

Respectfully submitted
Charles Sutton
Attorney for Appellant,
Bermudez
299 Broadway
New York, N.Y.

ABBREVIATED APPENDIX

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INDICTMENT

TPP:DAD:sd
F. #741783

FILED
IN CLERK'S OFFICE
U. S. DISTRICT COURT E.D. N.Y.

★ MAY 30 1974 ★

TIME A.M.
P.M.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - X

UNITED STATES OF AMERICA

- against -

Cr. No. _____
(T. 21 U.S.C., §846 and
§841(a)(1)
T. 18 U.S.C., §2))

EDUARDO BERMUDEZ,
JORGE VIVAS also known as
Jorge Posos,
ISRAEL DIAZ-MARTINEZ,
MANUEL FIFFE also known as
"Pfiefel",
VICTOR BLANCO also known as
"Red", and
LUIS FELIPE MIRANDA,

Defendants.

- - - - - X

THE GRAND JURY CHARGES:

COUNT ONE

On or about between the 31st day of October, 1973,
and the 1st day of May, 1974, both dates being approximate and
inclusive, within the Eastern District of New York and else-
where, the defendants EDUARDO BERMUDEZ, JORGE VIVAS also known
as Jorge Posos, ISRAEL DIAZ-MARTINEZ, MANUEL FIFFE also known
as "Pfiefel", VICTOR BLANCO also known as "Red", and LUIS FELIPE
MIRANDA, together with Juanita Diaz also known as "Jenny", herein
named as a co-conspirator but not as a defendant, and others,
did knowingly and intentionally conspire to violate Section
841(a)(1) of Title 21, United States Code.

INDICTMENT

1. It was a part of said conspiracy that the defendants and co-conspirators would knowingly and intentionally distribute and possess with intent to distribute cocaine hydrochloride, a Schedule II narcotic drug controlled substance.

2. It was further a part of said conspiracy that the defendants and co-conspirators would conceal the existence of the conspiracy and would take steps designed to prevent disclosure of their activities. (Title 21, United States Code Section 846).

COUNT TWO

On or about the 5th day of November, 1973, within the Eastern District of New York, the defendants VICTOR BLANCO, also known as "Red" and MANUEL FIFFE, also known as "Pfiefel" did knowingly and intentionally possess with intent to distribute approximately one ounce of cocaine hydrochloride, a Schedule II narcotic drug controlled substance. (Title 21 United States Code, Section 841(a)(1) and Title 18 United States Code Section 2).

COUNT THREE

On or about the 5th day of November, 1973, within the Eastern District of New York, the defendants VICTOR BLANCO, also known as "Red" and MANUEL FIFFE, also known as "Pfiefel" did knowingly and intentionally distribute approximately one ounce of cocaine hydrochloride, a Schedule II narcotic drug controlled substance. (Title 21 United States Code, Section 841(a)(1) and Title 18 United States Code Section 2).

INDICTMENT

COUNT FOUR

On or about the 12th day of November, 1973, within the Eastern District of New York, the defendants VICTOR BLANCO, also known as "Red", MANUEL FIFFE, also known as "Pfiefel" and LUIS FELIPE MIRANDA did knowingly and intentionally possess with intent to distribute approximately 1/8 kilogram of cocaine hydrochloride, a Schedule II narcotic drug controlled substance. (Title 21 United States Code, Section 841(a)(1) and Title 18 United States Code Section 2).

INDICTMENT

COUNT FIVE

On or about the 12th day of November, 1973, within the Eastern District of New York, the defendants VICTOR BLANCO, also known as "Red", MANUEL FIFFE, also known as "Pfiefel" and LUIS FELIPE MIRANDA did knowingly and intentionally distribute approximately 1/8 kilogram of cocaine hydrochloride, a Schedule II narcotic drug controlled substance. (Title 21 United States Code, Section 841(a)(1) and Title 18 United States Code Section 2).

INDICTMENT

COUNT SIX

On or about the 20th day of November, 1973, within the Eastern District of New York, the defendants EDUARDO BERMUDEZ, JORGE VIVAS, also known as Jorge Posos, MANUEL FIFFE, also known as "Pfiefel" and VICTOR BLANCO, also known as "Red" did knowingly and intentionally possess with intent to distribute approximately 1/2 kilogram of cocaine hydrochloride, a Schedule II narcotic drug controlled substance. (Title 21 United States Code, Section 841(a)(1) and Title 18 United States Code Section 2).

A TRUE BILL

David L. Rosen by DAVID
UNITED STATES ATTORNEY

James A. McElroy
FOREMAN

ATTORNEYS

For U. S.:

FIFFE-Legal Aid-15 Park!
for deft BERMUDEZ:

for deft BERMUDEZ:

Charles Sutton

299 Broadway, NYC.

964-8612

For Defendant: MIRANDA

Frank Lopez-31 Smith St.
B'klyn, N.Y.- 237-9500

AMOUNT

CASH RECEIVED AND DISBURSED

DATE _____

NAME

RECEIVED

DICBURN

2/7/75

Notice of appeal(No Fee)

VIVAS and BERMUDEZ)

2-20-75

History of Animal & Plant

2.21.75

Back to Trees

1

1

DATE _____

PROCEEDINGS

5-30-74	Before WEINSTEIN J - Indictment filed ordered sealed by the
	Court - Bench Warrants Ordered and Issued for all defts.

6-21-74	Before MISHLER, CH J - case called - defts BERMUDEZ & VIVAS present without counsel - Sealed Indictment ordered opened - Interpreter E. Rodriguez present - the court advised defts of their rights - arraignment continued to June 24 1974 @ 9:30 am . Bail set at \$250,000 as to defts BERMUDEZ & VIVAS.
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6-24-74	Notice of Appearance filed (VIVAS)
---------	------------------------------------

6-24-74	Before MISHLER, CH J - case called - defts BERNUDEZ, VIVAS & BLANCI present - Interpreter E. Rodriguez present for the defts - counsel for deft VIVAS present - deft VIVAS arraigned and enters a plea of not guilty - bail set at \$50,000 P/R Bond with wife to sign as surety and also the deed to his house - court to assign counsel
---------	---

DOCKET

DATE	PROCEEDINGS	CLERK'S FEES	
		PLAINTIFF	DEFENDANT
	for defts. BERMUDEZ & BLANCO - pleading adjd without date as to defts		
	BERMUDEZ & BLANCO.		
-74	By MISHLER, CH.J.- Order appointing counsel filed (BERMUDEZ)		
5-74	By MISHLER CH.J.- Order appointing counsel filed (BLANCO)		
-74	Bench warrant retd and filed- executed (ISRAEL DIAZ-MARTINEZ)		
-74	Before MISHLER, CH.J.- Case called- Deft Diaz-Martinez and counsel present		
	Deft arraigned and enters a plea of not guilty-Bail set at \$50,000 surety		
	co. bond or a P/R Bond secured by \$2,500 in cash and any interest in his		
	home. Wife of deft to sign as surety- Deft has until 7-3-74 at 4:00 P.M.		
	to comply to the bail condition		
-74	Notice of appearance filed (DIAZ-MARTINEZ)		
-74	Petitions for writs of habeas corpus ad prosequendum filed (MIRANDA and		
-74	By MISHLER, CH.J.- Writs issued, ret. 7-8-74 (MIRANDA and FIFFE)		
74	By SCHIFFMAN, MAG.- Order for acceptance of cash bail filed (DIAZ MARTINEZ)		
-74	Magistrates Proceeding and Certified copy of Warrant of removal received		
	from Eastern District of Louisiana and filed (EDUARDO BERMUDEZ)		
1-74	Before MISHLER, CH.J.- Case called- Deft FIFFE and deft MIRANDA present		
	with counsel- Court appointed Legal Aid as counsel for the deft FIFFE-		
	Interpreter Emil Rodriguez present for deft FIFFE- Both defts arraigned and		
	each enters a plea of not guilty- Bail set at \$50,000.00 surety co. bond		
	to both deft- Trial set for 9-30-74		
8-74	Notice of appearance filed (MIRANDA)		
74	Writ retd and filed ^{executed} (FIFFE)		
74	Writ retd and filed-executed (MIRANDA)		
1-74	By MISHLER, CH.J.- Order appointing counsel filed (FIFFE)		
-74	Certificate of Engagement filed -above case set down for trial		
	for Sept. 30, 1974 at 10:00 am in courtroom #5. signed by Chief		
	Judge Jacob Mishler dated July 9, 1974. (attys notified)		
-74	Before MISHLER, CH J - case called - motion for reduction of bail		
	as to deft BERMUDEZ - bail reset at \$100,000 surety Company bond.		
-74	Writs retd and filed - Executed (Miranda) (Fiffe)		
1-74	Before MISHLER, CH J - case called - motion for reduction of bail as		
	to deft BERMUDEZ - motion argued - decision reserved.		
-74	Before MISHLER, CH J - case called - motion for reduction of bail as		
	to deft Miranda - Bail is modified to \$50,000 personal bond to be		
	secured by a cash deposit of \$5,000.00.		
-74	Magistrates File 74M974 inserted into CR file		
-74	Notice of Motion filed, ret. 8-23-74, for inspection, Bill of Particulars		
	deft Israel Diaz-Martinez)		

DATE	PROCEEDINGS
8-16-74	Before Mishler, Ch J - case called - motion for reduction of bail argued (Victor Blanco) On application by the Govt the bail is reduced to \$10,000 P/R Bond signed by defts sister.
8-23-74	Before MISHLER, CH. J. - Case called- Motion for an order pursuant to Rule 16 argued- motion granted and denied as indicated on record (DIAZ-MARTINEZ)
9-9-74	Notice of motion for severance, etc. filed rete. 9-13-74 (DIAZ-MARTINEZ)
9-13-74	Before MISHLER, CH. J. - Case called- Motion for severance argued- motion denied (ISRAEL DIAZ-MARTINEZ)
9-20-74	By MISHLER, CH. J. - Order appointing counsel filed (FIFFE)
9-20-74	Petition for writ of habeas corpus ad prosequendum filed - (FIFFE)
9-20-74	By WEINSTEIN, J. - Writ issued ret. 9-24-74 (FIFFE)
9-24-74	Writ ret'd and filed- executed (FIFFE)
9-24-74	Petitions for writs of habeas corpus ad prosequendum filed (BLANCO, MIRANDA and FIFFE)
9-24-74	By MISHLER, CH. J. - Writs issued, ret. 9-25-74 (above 3 defts)
9-25-74	Petition for writ of habeas corpus ad Prosequendum as to defts BLANCO, MIRANDA FIFFE Filed.
9-26-74	By JUDD, J. - Writs issued ret. 9-28-74 as to defts BLANCO, MIRANDA and FIFFE.
9/28/74	Petition for Writ of Habeas Corpus Ad Prosecuendum filed (V. BLANCO)
9/28/74	By JUDD, J. - Writ issued, ret. 9-27-74
9-30-74	Before Judd, J - case called - defts & counsels present - adjd to Oct. 4, 1974 for motions and Oct. 15, 1974 for trial.
10/1/74	Writs ret'd and filed executed (BLANCO(2), FIFFE(2), and MIRANDA)
10-2-74	Notice of Appearance filed as to deft BERMUDEZ.
10-3-74	Notice of Motion filed for review of bail, etc. (ret. 10-4-74) deft Bermudez.
10-3-74	Petition for Writ of Habeas Corpus Ad Prosequendum filed (FIFFE)
10-3-74	By MISHLER, CH J - Writ Issued, ret. Oct. 7, 1974 (FIFFE)
10/4/74	Before MISHLER, CH. J. - Case called- Motion by deft Diaz-Martinez for a severance argued- motion denied - deft BERMUDEZ and counsel present interpreter present- motion for reduction of bail argued- bail reduced to \$50,000.00 cash, deposit of \$5,000.00- with the wife and mother in signing as surety-Also wife and mother in law to surrender passports
10-8-74	Writ ret'd and filed - executed (Fiffe)

CRIMINAL DOCKET

DATE	DOCKET	PROCEEDINGS
10/21/74	Before MISHLER, CH.J.-	Case called- Defts BERMUDEZ, VIVAS and DIAZ-MARTINEZ present with counsel- Interpreters present- Trial resumed Motion by deft DIAZ-MARTINEZ for severance is denied- Motions by defts VIVAS and DIAZ-MARTINEZ for a mistrial is denied- Trial contd to 10/22 at 10:00 A.M.
10-22-74	Before MISHLER, CH J -	case called - defts BERMUDEZ, VIVAS & DIAZ-MARTINEZ present with counsels - Interpreters J.Guma and Emil Rodriguez present - trial resumed - Govt rests - motion by defts BERMUDEZ & VIVAS to dismiss counts 1 and 6 is denied - Motion by deft DIAZ-MARTINEZ for severance, mistrial and dismissal is denied - Trial continued to Oct. 23, 1974.
10-23-74	Before MISHLER, CH J -	case called - defts present with counsels trial resumed - Interpreters Guma & Rodriguez present - defts Bermudez & Vivas rest. Motion by deft Diaz-Martinez for mistrial is denied. Deft Diaz=Martin rests - trial contd to Oct,24,1974.
10/24/74	Before MISHLER, CH.J.-	Case called- defts BERMUDEZ, VIVAS, and DIAZ-MARTINEZ, present with counsel- Interpreters present- Trial resumed Govt and defts reset- Motion by the defts to dismiss the indictment- motion denied- Trial contd to 10/25/74 at 10:00 A.M.
10/24/74	By MISHLER, CH.J.-	Order of sustenance filed
10/25/74	Before MISHLER, CH.J.-	Case called- Defts BERMUDEZ, VIVAS and DIAZ-MARTINEZ present with counsel- Interpreters present- Trial resumed- Jury retires to deliberate- At 7:30 P.M. jury advised the court that they would like to return tomorrow for further deliberation- Court excused Jury for day and are to resume deliberations on 10/26/74 at 11:30 A.M.
10/25/74	By MISHLER, CH.J. -	Order of sustenance filed
10/26/74	Before MISHLER, CH.J.-	Case called- Defts BERMUDEZ, VIVAS and DIAZ-MARTINEZ present with counsel- Interpreter J. Guma present- Trial resumed At 12:15 jury resumed their deliberations - Order of sustenance signed for lunch- At 4:05 jury returned and rendered a verdict of guilty on count 1 as to deft BERMUDEZ, VIVAS and DIAZ-MARTINEZ, and not guilty on count 6 as to defts BERMUDEZ and VIVAS- Jury polled- Jury discharged Trial concluded- Memo of verdict signed by the foreman and ordered filed Bail conditions contd- All motions reserved until sentence- sentence adjd without date
10/26/74	By MISHLER, CH.J.-	Order of sustenance filed
10/26/74		Memorandum of verdict filed

DOCKET

PROCEEDINGS

- 9-74 ~~thxprxwxixx~~ Petition for Writ of Habeas Corpus Ad Prosequendum filed (defts Fiffe, Victor Blanco & Luis Felipe Miranda)
- 9-74 By COSTANTINO J - Writs issued, ret. Oct. 10, 1974 as to Luis Felipe Miranda and ret. Oct. 9, 1974 as to Fiffe & Blanco.
- 9-74 Notice of Motion filed (deft Israel Diaz-Martinez) for suppressing evidence etc. (forwarded to Chambers) ret. date Oct. 15, 1974.
- 9/8/74 By CATOGGIO, MAG.- Order for acceptance of cash bail filed (EDUARDO BERMUDEZ)
- 10/11/74 Petitions for writs of habeas corpus ad prosequendum filed (FIFFE, MIRANDA)
- 11/11/74 By MISHLER, CH.J.- Writs issued, ret. forthwith
- 11-15-74 Before MISHLER, CH J - case called - motion for vacating search warrant, etc. Motion argued and motion denied. (Israel Diaz-Martinez)
- 10-15-75 Writs retd and filed - Executed as to defts FELIPE MIRANDA, BLANCO & FIFFE.
- 11/15/74 Before MISHLER, CH.J.- Case called- Deft BERMUDEZ, VIVAS, MARTINEZ, FIFFE, BLANCO and MIRANDA present with counsel- Defts FIFFE, BLANCO and MIRANDA withdraw their pleas of not guilty and after being advised of their rights by the court and on their own behalf each enter a plea of guilty to count 1- Motion by govt to sever as to defts FIFFE, BLANCO MIRANDA is granted- Trial ordered and begun- Jurors selected and sworn- Interpreters present- Trial cont to 10/16/74 at 10:00 A.M.
- 11-16-74 Before MISHLER, CH J - case called - defts BERMUDEZ, VIVAS, DIAZ - MARTINEZ present with counsels - Interpreters J. Guma and Emil Rodriguez present - trial resumed - motion by defst DIAZ-MARTINEZ for a severance is denied - motion by defst VIVAS & DIAZ-MARTINEZ is denied - trial contd to Oct. 17, 1974.
- 11/17/74 Before MISHLER, CH.J.- Case called- Deft BERMUDEZ, VIVAS and DIAZ-MARTINEZ present with counsel- Trial resumed- Motion by defst DIAZ-MARTINEZ for a mistrial is denied- Hearing held on motion to suppress- Hearing contd to 10/18/74 at 9:30 A.M.- Trial contd to 10/18/74 at 10:00 A.M.
- 10-18-74 Govts Memorandum of Law, defts Memorandum of Law in support of motion for an order vacating the search warrant issued for 293 Grand Street and suppressing all evidence etc. filed received from Chambers and returned.
- 11-18/74 Before MISHLER, CH.J.- Case called- Deft DIAZ-MARTINEZ and counsel present- Hearing resumed- Motion to suppress is granted- Hearing concluded- Defts BERMUDEZ, VIVAS and DIAZ-MARTINEZ present with counsel- Interpreters present- Trial resumed- Motion by defts BERMUDEZ and DIAZ-MARTINEZ for a mistrial denied- Trial contd to 10/21/74 at 10:00 A.M.

Abbott-direct

1 7
2 A Yes, I did.

3 Q Will you tell us when you met Mr. Blanco and
4 under what circumstances.

5 A I was taken to Mr. Blanco's residence by an
6 informant. We arrived at Mr. Blanco's apartment --

7 MR. SUTTON: Objection and move to strike.

8 THE COURT: May I have that.

9 (Question and answer read.)

10 THE COURT: The witness is testifying to
11 matters and events that took place when none of these
12 defendants were present.

13 In our law an accused is chargeable only with
14 what that accused says and does and not anybody says
15 or does or not what anybody says about him. That makes
16 sense because criminal liability is a personal thing.
17 A man is chargeable with his own actions and own words
18 and nobody elses.

19 There is one exception among others to the rule.
20 These defendants are charged with being part of a
21 conspiracy. A conspiracy is defined as being a partner-
22 ship in a criminal venture -- a criminal business.

23 Now, in a legitimate business every partner is
24 responsible for what every other partner does during
25 the term of the partnership and for transactions or

2 conversations that are performed or undertaken in order
3 to advance the business. For example, if one of you
4 and I were in let us say the grocery business, and
5 let us assume I was the man behind the counter and
6 I was dealing in the retail trade and selling all the
7 cans and beer and butter and bacon, and let us say that
8 one of you were the one that went out and bought all
9 the merchandise, and one day you decided to buy 500
10 cases of canned corn. I do not know a thing about it.

11 As a matter of fact, I opposed it because I
12 knew, being behind the counter, that we sell only
13 three cans of corn a month. Well, if you made that
14 purchase I'd be bound by it, even though I knew nothing
15 about it because in a legitimate partnership every
16 partner is bound by the acts -- we call it -- within
17 the scope of authority of the partners, done during the
18 term of the partnership and to advance the business of
19 the partnership and so in a criminal partnership.

20 Once the Government proves beyond a reasonable
21 doubt that the partnership, as alleged in the indictment,
22 existed for the purposes and at the time and place
23 charged -- the charge is on or about and between the
24 31st day of September and the 1st day of May 1974 --
25 and the purpose of the partnership was to knowingly

Abbott-direct

9

and intentionally distribute and possess with the intent to distribute cocaine hydrochloride, I said that means in effect to buy and sell and deal in cocaine, and the Government proves beyond a reasonable doubt that Mr. Blanco -- Victor Blanco was a member of that conspiracy -- in other words, was a co-conspirator, then any accused -- I am sorry, I have gone a little too fast.

And further the Government proves beyond a reasonable doubt that the transactions, the conversations were during that term -- the term of the partnership -- and for the business of the partnership, again to deal in cocaine, then any accused that the Government proves knowingly and wilfully became a member of that conspiracy by proof beyond a reasonable doubt is bound by what the conspirators said and did.

Now, when I say, "knowingly and wilfully entered into the conspiracy," it means that the Government's proof that the accused was aware of what he was doing, aware of the purpose of the conspiracy, that it was to deal in cocaine, and entered into it knowing it was a violation of law.

If the Government does not prove all of those conditions, just disregard it.

10

Abbott-direct

216

When I use the word "accused," I use it singularly or plural.

If the Government proves all that, then of course first the Government must prove that the accused became a member of the conspiracy even before you even consider it.

If the Government proves all that, then that accused that the Government proves became a member of the conspiracy, is bound by the statements and acts of the co-conspirators, even though that accused did not know that the transaction was about to occur or would occur or had occurred, even though he may have objected to it and even though he may not have been present.

The analogy is, as I say, to a legitimate partnership. You hold this testimony in a cubby-hole and see if the Government fulfills all those conditions. If it does not, just disregard the testimony. If it does, then charge it against the accused who is a member of the conspiracy.

MR. SUTTON: May we have a sidebar?

THE COURT: The jury may be excused.

(The jury left the courtroom.)

(Continued on next page.)

HRS:jm
T3pmR2

1 MR. SUTTON: I believe your explanation of
2 the idea of a conspiracy has omitted to express or set
3 clearly to the jury the essence of a conspiracy, which
4 is the knowing and willful agreement of a party or
5 parties that are involved, and is not a falling into
6 like an accidental partnership or an informal partner-
7 ship or anything of that kind and it is not similar to
8 a civil partnership in any respect that we are talking
9 about here. There must be, as I understand it, the
10 necessity of a willful, knowing agreement -- an
11 intelligent agreement of this unlawful enterprise.

12 THE COURT: Mr. Shapiro, would you read back the
13 part where I said the Government must prove that an
14 accused knowingly and willfully entered into the
15 conspiracy and I defined what I meant by knowingly and
16 willfully?

17 MR. SUTTON: I do not think you used the word
18 agreement.

19 THE COURT: I didn't?

20 MR. SUTTON: I do not think so.

21 THE COURT: Did I use conspiracy?

22 MR. SUTTON: You used conspiracy.

23 THE COURT: You say I have to use agreement?

24 MR. SUTTON: Yes.

25 THE COURT: I won't use it. There are no magic

1 words and you cannot give them to me.

2 MR. SUTTON: If you defined --

3 THE COURT: Get the charge book and I will read
4 it word for word from the charge book. I will give it
5 to them word for word from the charge book.

6 MR. SUTTON: Isn't a conspiracy an agreement?

7 THE COURT: If I can try to comply with the
8 wishes of defense counsel, I will do it. I will give
9 it to you right out of the charge book word for word.

10 MR. SUTTON: Why does it hurt --

11 THE COURT: Because there is no need to argue a
12 point like this. I want to prove my point.

13 MR. SUTTON: I would also --

14 THE COURT: You say it is inadequate because I
15 did not use the word, "agreement".

16 MR. SUTTON: Yes.

17 May I also call to your attention that you also
18 said that if a defendant opposed it, that goes again
19 to the issue of whether or not your statement of
20 opposition was after the entrance into the conspiracy
21 and whether you failed to include that the opposition
22 to it may mark a termination of a conspiracy.

23 THE COURT: Mr. Sutton, I will correct my
24 mistake in the charge by reading it word for word from
25 the charge book.

1 MR. SUTTON: You put us at a disadvantage at
2 this point. We are now going to have to be figuring
3 up the charge to the jury at mid-trial --

4 THE COURT: Look what we are doing here. In
5 the middle of an answer we are interrupting for this
6 needless colloquy.

7 MR. SUTTON: I am compelled to do it, because
8 we have a jury that has been told certain things.

9 THE COURT: If the jury was misinformed, I will
10 correct it.

11 MR. MAHLER: I would like to join in Mr. Sutton's
12 remarks and I would make a similar objection.

13 THE COURT: All right.

14 In any time one defendant makes an objection,
15 it inures to the benefit of all three, unless one gets
16 up and indicates that he departs from the position
17 taken by the others.

18 Call the jury in.

19 (Jury present.)

20 THE COURT: Please disregard everything that I
21 said about the definition of conspiracy.

22 I am going to read to you what is almost a
23 text book definition of conspiracy:

24 "A conspiracy is a combination of two or more
25 persons, by concerted action, to accomplish some

1 unlawful purpose or to accomplish some lawful purpose
2 by unlawful means.

3 "So, a conspiracy is a kind of partnership in
4 criminal purposes in which each member becomes the
5 agent of every other member.

6 "The gist of the offense is a combination or
7 agreement to disobey or disregard the law.

8 "Mere similarity of conduct among various
9 persons and the fact that they may have associated
10 with each other and may have assembled together and
11 discussed common aims and interests, does not necessarily
12 establish proof of the existence of the conspiracy.

13 "However, the evidence in the case need not
14 show that the members entered into any express or
15 formal agreement or that they directly, by words
16 spoken or in writing, stated between themselves what
17 their object or purpose was to be or the details there-
18 of, or the means by which the object or purpose was
19 to be accomplished.

20 "What the evidence in the case must show beyond
21 a reasonable doubt in order to establish proof that a
22 conspiracy existed, is that the members in some way or
23 manner or through some contrivance positively or
24 tacitly came to a mutual understanding to try to
25 accomplish a common and unlawful plan.

Abbott-direct

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2 THE COURT: (Continuing.) The evidence in the
3 case need not establish that all of the means or
4 methods set forth in the indictment were agreed upon
5 to carry out the alleged conspiracy, nor that all the
6 means or methods which were agreed upon were actually
7 used and put into operation, nor that all of the
8 persons charged to have been members of the alleged
9 conspiracy were such.

10 What the evidence in the case must establish
11 beyond a reasonable doubt is that the alleged con-
12 spiracy was knowingly formed and that one or more
13 of the means or methods described in the indictment
14 were agreed upon to be used in an effort to effect
15 or accomplish some object or purpose of the conspiracy
16 as charged in the indictment; and that two or more
17 persons, including one or more of the accused, were
18 knowingly members of the conspiracy as charged in the
19 indictment.

20 Now, I gave you that because I wanted you to
21 know how to treat evidence of conversations or acts
22 out of the presence of the accused. I will read that
23 charge.

24 Whenever it appears beyond a reasonable doubt
25 from the evidence in the case that a conspiracy existed

Abbott-direct

and that a defendant was one of the members, and the statements and the acts by any person likewise found to be a member may be considered by the jury as evidence in the case as to the defendant found to have been a member even though the statements and acts may have occurred in the absence and without the knowledge of the defendant, provided such statements and acts were knowingly made and done during the continuance of such conspiracy and in furtherance of some object or purpose of the conspiracy. Otherwise, any admission or incriminatory statements made or acts done outside of Court by one person may not be considered as evidence in the case against any person who is not present and heard the statements made or saw the acts done.

Now, before you may charge a defendant with the acts or declarations of one conspiracy outside his presence or without his knowledge there must be proof beyond a reasonable doubt of his entry, his membership in the conspiracy.

And, again, I will give you what is almost a textbook definition of the type of evidence necessary to bring an accused into the conspiracy.

One may become a member of the conspiracy without

1 3 Abbott-direct
2 full knowledge of all the details of the conspiracy.
3 On the other hand, the person who has no knowledge of
4 the conspiracy but happens to act in a way which
5 furthers some object or purpose of the conspiracy does
6 not therefore become a conspirator. Before the jury
7 may find that a defendant or any other person has
8 become a member of the conspiracy, the evidence in
9 the case must show beyond a reasonable doubt that
10 the conspiracy was knowingly formed and that the
11 defendant or other person who is claimed to have been
12 a member knowingly participated in the unlawful plan
13 with intent to advance or further some object or pur-
14 pose of the conspiracy.

15 To act or participate knowingly means to act
16 or participate voluntarily and intentionally and not
17 because of mistake, accident or other innocent reason.

18 So if a defendant or other person with under-
19 standing of the unlawful character of a plan intention-
20 ally encourages, advises or assists for the purpose of
21 furthering the undertaking or scheme, he thereby
22 becomes a knowing participant.

23 A conspirator, one who knowingly joins an
24 existing conspiracy, is charged with the same
25 responsibility as if he had been one of the originators

4 Abbott-direct

or instigators of the conspiracy.

In determining whether or not a defendant or any other person was a member of the conspiracy, you are not to consider what others may have said or done. That is to say, the membership of a defendant or any other member of the conspiracy must be established by the evidence in the case as to his own conduct, what he himself knowingly said or did,'

With that you may continue, Mr. Kimelman.

MR. KIMELMAN: Thank you, your Honor.

DIRECT EXAMINATION

BY MR. KIMELMAN: (Cont.)

Q Special Agent Abbott, I ask you when and where you met Victor Blanco. Will you tell us again, please?

A I met Victor Blanco in his apartment at approximately 4:30 p.m. on October 31st, 1973.

Q Where is this apartment located?

A 97 Clinton Avenue, Brooklyn.

Q who else was present at that time?

A With me?

Q Yes.

A An informant.

MR. STTON: I can't hear, your Honor.

THE COURT: Would you repeat the --

1 that mere association isn't enough. If I say that,
2 I'll give the whole charge.

10 3 MR. MAHLER: Judge, I only brought it up --

4 THE COURT: We'll take a five-minute recess.

5 (Recess had.)

6 MR. MAHLER: Your Honor, I expect to be about
7 twenty minutes.

8 THE COURT: Seat the jury.

9 (Jury in.)

10 THE COURT: Now, I ruled that the questions and
11 the answers to questions relating to some talk about
12 marijuana were totally irrelevant to the charge in
13 this indictment. And I advised the United States
14 Attorney that it was improper to develop the testimony
15 as to those conversations.

16 The defendants are here ready to defend on the
17 charge in this indictment, and I'll just ask you to
18 strike it from your consideration and your minds, just
19 as I have directed the court reporter to strike it
20 from his recording.

21 Now you can go on, Mr. Kimelman, from there.

22 MR. KIMELMAN: Thank you, your Honor.

23
24 (continued on next page)

CHARGE

Fiffe - cross - Mahler

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THE COURT: I heard you. This witness said he refreshed the dates from the charges in the indictment and the Jury -- Mr. Mahler asked what dates are stated in the indictment, and he asked me to read them, and I'll be glad to oblige him.

MR. SUTTON: Is it possible, your Honor, that the Court again cautions the Jury that the testimony is not binding on the defendant Bermudez?

THE COURT: No. You haven't advanced any theory by which it wouldn't be binding. I will give the limiting instruction again on conspiracy, if you wish, that I'd be glad to give. It will only be binding on the fulfillment of all the conditions.

If you want that I'll give it.

MR. SUTTON: Yes, sir.

THE COURT: Sure, I'll be glad to give that. Seat the Jury.

(Jury present.)

THE COURT: Count One of the indictment, on or about and between the 31st day of October, 1973, and the 1st day of May, 1974, both dates being approximate and inclusive.

Count Two of the indictment is not before you but charges this witness and others, on or about

CHARGE

Fiffe - cross - Mahler

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November 5, 1973.

Count Three of the indictment does not charge any of the defendants before you but charges this witness and others, on or about the 5th day of November, 1973.

Count Four of the indictment does not charge any of the defendants before you but charges this witness and others on or about the 12th day of November, 1973.

Count Five of the indictment does not charge any of the defendants before you but charges this witness and others on or about the 12th day of November, 1973.

Count Six I read to you at the outset, or if I haven't, I'll read it in full:

"On or about the 20th day of November, 1973, within the Eastern District of New York, the said Eduardo Bermudez, Jorge Vivas, also known as Jorge Josas, Manuel Fiffe, also known as Pfiefel, and Victor Blanco, also known as Red, did knowingly and intentionally possess, with intent to distribute, approximately one-half kilogram of cocaine hydrochloride, a Schedule 2 narcotic drug controlled substance."

I have been asked to remind you about the

Fiffe - cross - Mahler

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limiting effect of testimony given by this witness,
that he says was outside of the presence of any of
the defendants.

If you recall, I read almost at the outset
fo the trial a charge to you on when statements or
acts of a co-conspirator can be attributed and
charged against -- can be attributed to and charged
against accused.

In our system of juris prudence, an individ-
ual is responsible for only what that individual
says or does, not what someone else says or does.
One of the exceptions is where we have a conspiracy,
where a conspirator becomes the agent and as an agent
binds every other member of the conspiracy with re-
lation to what the conspirator says or does during
the term of the conspiracy, and what he says or
does to advance the business of the conspiracy.

(Continued on next page.)

MMfols. 20

Fiffe-cross/Mahler

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3 THE COURT: First the Government must prove
4 that a conspiracy existed and that proof must be
5 beyond a reasonable doubt, then if the Government
6 proves beyond a reasonable doubt that the witness
7 was a member of the conspiracy or that the individual
8 he spoke with was a member of the conspiracy, then
9 whatever the conspirators who took part in the conversa-
10 tion or performed the acts said or did, during the
11 time of the conspiracy, and you heard the term on or
12 about and between the 31st day of October 1973 and
13 the 1st day of May of 1974, both dates being approxi-
14 mate, and if you find the acts or declarations worked
15 to advance the purpose of the conspiracy, or part of
16 the business of the conspiracy, that it concerned in
17 this case cocaine, then any accused who you find the
18 Government proved beyond a reasonable doubt knowingly
19 and willfully entered into that conspiracy is also
20 bound by what that co-conspirator said or did, even
21 though that co-conspirator, even though the accused
22 did not know, wasn't aware of what was said or done.

23 Now, I charge you now that the Government must
24 prove that the entrance into the conspiracy was
25 knowingly and wilfully, in other words that the
accused was aware of what the business of the

Fiffe-cross/Mahler

conspiracy was, understood that it was for dealing in cocaine, possessing it, distributing it and selling it, and that knowing that participated in it, knowing that his participation was to advance the purpose of the conspiracy.

If the Government does not prove all the conditions beyond reasonable doubt disregard the testimony of any witness concerning conversations or acts performed outside the presence of the accused.

All right, you may proceed, Mr. Mahler.

CORSS-EXAMINATION

BY MR. MAHLER (Continued):

Q Do you see the date November 8th in that indictment?

MR. KIMELMAN: Objection.

THE COURT: I will allow it.

A Yes.

Q You do?

A No, it is something --

MR. SUTTON: Objection, your Honor. Anything after the word no.

THE COURT: Strike it out as not responsive.

Q Yes or no, do you see the date November 8th in the indictment?

CHARGE

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(The jury took its place in the Jury box.)

Charge of Honorable Jacob Mishler, Chief
United States District Judge.

THE COURT: Madam Forelady and ladies and
gentlemen of the jury:

We have reached that point in the trial where
it becomes my duty to instruct you on the applicable
law.

The lawyers have completed their tasks, they
have performed their obligations, their obligations
relate to the relationship they have with their
clients.

Both the Government and the defendants are
represented by attorneys. As you are aware, Mr.
Kimelman's client is the Government, the three
defendants are represented respectively by Mr.
Sutton, Mr. Mattarazzo and Mr. Mahler.

Everyone is treated the same in this court
room, Mr. Kimelman isn't given any greater or
different consideration than Mr. Sutton or Mr.
Matarazzo or Mr. Mahler; everyone is treated alike
and that is what we mean by being fair.

But their job is as adversaries, each taking
their respective side in the case and they act in

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2 such a manner as to develop the evidence in the case
3 on the issues that are before you. That is why we
4 call this an adversary proceeding.

5 But there are two other participants in the
6 trial, and that is the jury and the Court, and there
7 is a difference between the Court and jury on the one
8 hand and the lawyers for the parties on the other.

9 The lawyers are protagonists and as such per-
10 form their duty; they should demonstrate their partis-
11 anship and act in such a manner as will do an
12 effective job.

13 The Court and the jury, on the other hand, are
14 objective, nonpartisan. Each of us should look at
15 our obligation and function as requiring determinations
16 based on what the evidence is for the jury and on
17 what the law is for the Court.

18 You are to make your determination free of all
19 bias or prejudice or sympathy.

20 Now as between the Court and the jury, there
21 is a distinct line of demarcation:

22 Each one is a judge, the jury is a judge and
23 the Court is a judge. The jury has the sole authority
24 to judge the facts, that means that the jury and the
25 jury alone determines what happened -- based on the

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2 evidence of course. The Court should make rulings on
3 the law based on what the Court believes is the law.
4 Each one should respect the authority of the other and
5 be careful not to encroach upon the authority of the
6 other. I don't intend in anyway to suggest any
7 findings whatsoever. That is your job. You on the
8 other hand must respect the authority of the Court
9 and you must accept the law as the Court charges it.

10 I will charge you on any number of principles
11 concerning witnesses, the statutory law, the
12 essential elements of the crimes charged and other
13 principles.

14 You must accept the law even if you don't like
15 the law, even if you feel that Congress was wrong in
16 passing the Drug Abuse Act of 1970, about which I
17 will charge you. The Congress passed the law and we
18 must all accept it as the law. Our individual and
19 personal dislikes as to any instruction that I give you
20 on the law should be set aside.

21 If each one of us knows and respects the
22 authority of the other and understands the function
23 of the lawyers and that a trial is an adversary
24 proceeding, then I think that it will go a long way
25 towards giving the parties a fair trial.

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2 My rulings, my statements during the trial
3 with reference to the rulings, and even a display
4 of irritation that might have been evident during
5 the trial should not influence your determination
6 here; there is nothing personal in my rulings. I
7 hope you understand that the Court at least attempted
8 to treat the lawyers fairly, decided the objections that
9 were made based on what the Court understood the law
10 to be, and that in giving you the instructions now I
11 intend in no way to suggest any opinion which the
12 Court may have as to the outcome of these proceedings.

13 You have before you a document called Memorandum
14 of Verdict. I have struggled a long time over
15 describing the document, but you might as well call
16 it a scrap of paper. It has no standing in the trial
17 as such. It is a useful tool for the jury. With
18 it there is a copy of Count 1 and Count 6 of the
19 indictment.

20 Count 1 and Count 6 are each a verbatim copy
21 of those counts in the indictment while the Memorandum
22 of Verdict is just a paraphrasing, a precept of the
23 charges, and when you go into the jury room to
24 deliberate you may use it for your purposes. I will
25 ask the foreman to take an extra copy with him and

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2 mark it up to indicate your verdict and then sign it
3 so I may have it as a record.

4 We were talking about the indictment. You must
5 understand at the outset that the indictment is the
6 method by which the law brings someone into court to
7 face a charge and to which the defendants have pleaded
8 not guilty. The statements in the indictment should
9 not be assumed to be true nor should they give any
10 substance to the charges themselves.

11 The indictment is not proof of the charges.
12 It is as if someone, the plaintiff, sued you in a
13 civil case for \$100 and would be saying to you, "You
14 owe me \$100." Well, if you come in to court and say,
15 "No, I don't owe you \$100," plaintiff could not come
16 and say as proof, "Well, there you are, it is in the
17 complaint." That is not proof of the obligation.
18 The plaintiff has to have witnesses come into court
19 and prove that you owe him a hundred dollars. The
20 indictment is submitted to you just so you can keep your
21 eye on the ball and understand that there are really
22 five charges here, five trials in one, three in the
23 first count against all three defendants and two in
24 the second count against the defendants Bermudez and
25 Diaz.

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2 The Memorandum of Verdict is only a version
3 of what is contained in the indictment so that you
4 may have a precise view of what the charges are
5 against these defendants. The indictment contains
6 other parties and other allegations that might
7 divert your attention from the precise charge and
8 you must keep your eye on the precise charge to
9 see if the Government proved the charge.

10 That is the effect of the two documents that
11 are before you.

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13 (Cont'd on next page.)
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2 In every criminal trial the defendant is
3 presumed to be innocent.

4 I will use the singular or the plural, but it
5 means all the defendants except if I specifically
6 refer to a charge and say this principle or this
7 charge or this instruction refers to a particular
8 defendant.

9 You are to assume otherwise that I am
10 referring to all defendants.

11 All the defendants are presumed to be innocent.
12 That is a time-honored presumption of Anglo-American
13 law. It is a strong presumption, it says in effect
14 you must conclude at the outset of the trial that
15 the defendant is innocent of the crime charged, and
16 that conclusion, that presumption remains with the
17 defendant throughout the trial and throughout your
18 deliberations and prevails unless and until the
19 presumption is overcome by proof to the contrary, to
20 wit by proof beyond a reasonable doubt that the
21 defendant is guilty of the crime charged.

22 The effect of that is very significant: The
23 defendants do not have to prove anything or offer any
24 evidence to prove their innocence. They can rely on
25 the failure of the Government to prove its case by
proof beyond a reasonable doubt.

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2 In other words, your function is not so much
3 to find out if the defendants are innocent or if they
4 are guilty; it is more precisely to determine whether
5 the Government proved the guilt of the defendants by
6 proof beyond a reasonable doubt.

7 In Scotland we have three verdicts -- I should
8 not say "we have" I should say "They have" -- it is
9 guilty, not guilty, not proved.

10 In this country we have only two, guilty, not
11 guilty, but our not guilty verdict includes not proved.

12 The Government's burden is to prove the guilt
13 of the defendant beyond a reasonable doubt. A
14 reasonable doubt is a doubt which a reasonable person
15 has after weighing all the evidence.

16 It is a doubt based on reason and common
17 sense and the state of the record. It is not some
18 vague speculative doubt, it is not some suspicion
19 that you might have. On the other hand, it is not
20 a doubt based on a distaste to perform an unpleasant
21 task.

22 A reasonable doubt is the kind of doubt that
23 would make a reasonable person hesitate to act in a
24 matter of importance in his own life.

25 Proof beyond a reasonable doubt is therefore

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2 proof of such a convincing character that you would
3 be willing to rely upon it unhesitatingly in the most
4 important and weighty of your own affairs.

5 The Government's burden is not to prove the
6 guilt of the defendant beyond all doubt -- there is
7 a qualifying adjective -- it is beyond all reasonable
8 doubt.

9 The Government's burden is not to prove that
10 every bit of evidence offered in the trial is true

11 beyond a reasonable doubt, the Government's
12 burden is to prove every essential element of the
13 crime charged, beyond a reasonable doubt.

14 Later in the charge I will charge you on what
15 the essential elements of the crimes charged are.

16 Again, defendants do not have to prove their
17 innocence; they do not have to offer any proof what-
18 soever; they may rely on the failure of the Government
19 to prove the guilt of the defendant beyond a
20 reasonable doubt.

21 What is evidence is classified as direct
22 evidence or indirect, which is also called circum-
23 stantial evidence.

24 Direct evidence is the testimony of a witness,
25 of what that witness saw or heard. Indirect or

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2 or circumstantial evidence is a method of determining
3 a disputed fact by drawing an inference from
4 established facts based on your good common sense and
5 experience.

6 If you were sitting as a jury in a civil case,
7 in a personal injury action, and Plaintiff A was suing
8 Defendant B, claiming that B had passed a
9 stop sign without stopping and struck A causing
10 injuries, well, let us use that hypothetical
11 situation, and let us assume Mr. Adler, my Court Deputy,
12 and myself were standing at the corner at the
13 precise time and place where the sign was located;
14 let us assume he had his back to the sign and I was
15 talking with him and had the sign in full view and
16 the roadway in full view: Well, if I were called to
17 the witness stand and asked to testify as to what I
18 saw, I might say, "Well, I saw a white 1974 Cadillac
19 travelling at 65 miles an hour pass the sign, cross
20 the roadway, strike B, and knock B down" -- knock
21 A down, B is suing. Now, that is direct testimony
22 of that disputed issue, the defendant saying, "No,
23 I stopped first and then I proceeded," and Plaintiff
24 A of course saying, "No, he continued and passed the
25 sign without stopping."

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2 Mr. Adler didn't see the vehicle pass the
3 stop sign, but he is competent to testify about the
4 circumstances from which a jury might draw a
5 reasonable inference that that is just what happened.

6 He might testify that as he was speaking with
7 me there came within his peripheral vision a white
8 Cadillac travelling about, well, it is 65 miles an
9 hour, pass behind him for a distance of about 150 feet,
10 that two or three seconds later he saw it again and
11 then saw the motor vehicle strike A, knocking A down.

12 Now you as a jury could draw from those
13 circumstances the reasonable inference, based on your
14 good common sense and your experience, that that motor
15 vehicle passed the stop sign without stopping. The
16 circumstances are that the motor vehicle was driving
17 at 65 miles an hour and traversed about 150 feet in
18 two or three seconds and that it would have been
19 quite impossible for him to have covered these 150
20 feet in two or three seconds had he stopped and then
21 proceeded.

22 So I say you may come to the same conclusion
23 by direct evidence as you may be indirect or circum-
24 stantial evidence and the law does not hold that one
25 type of evidence is better than the other type of

evidence, the law says that at times circumstantial evidence is of a better quality and that at other times direct evidence is of a better quality.

The law requires the Government to prove its case on both the direct and the circumstantial evidence.

Now I have used the term "inference" when I referred to circumstantial evidence and I used the term "presumption" when I referred to the presumption of innocence.

There is a difference.

An inference is a conclusion which the jury may make based on good common sense and experience; the example of that, of course, is arriving at a determination of a disputed fact from circumstantial evidence.

A presumption, on the other hand, is a conclusion which the law requires the jury to make and it continues until and only if proof to the contrary is shown by proof beyond a reasonable doubt, and of course the example of that is the presumption of innocence.

What is the evidence in the case? It is the sworn testimony of all the witnesses regardless of

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2 who called the witness. It is not based on the
3 number of witnesses each side called, it is based
4 on the quality of the testimony that is offered.

5 It is the exhibits received in evidence
6 regardless of who may have introduced them. It is
7 the facts which have been stipulated to, and there
8 was a written stipulation entered into. There may
9 have been other stipulations entered into between the
10 lawyers on the record but I don't recall that.

11 It is also the facts which have been judicially
12 noticed by the Court. In other words, at times I
13 said that a certain date of the month fell on a
14 certain day of the week, that is a judicially noticed
15 fact.

16 It may be helpful for you to know what is not
17 evidence.

18 One, the statements counsel made in the open-
19 ings and the statements or arguments counsel made
20 in summations -- and of course, that includes their
21 recital of the testimony, at times they recited from
22 their own recollections. Well, that is not evidence.
23 The evidence is what you heard, not what they heard.

24 The openings served a very useful function, they
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2 alerted you to what was to follow. As one lawyer
3 pointed out, the evidence does not come in any set
4 pattern, any chronological order, and so if you
5 know the theories of the parties you can more easily
6 follow that testimony.

7
8 Summations, on the other hand, are intended to
9 focus attention on what the lawyers regard as the
10 important parts of the evidence in the record and of
11 theories of inculpability, which were offered by
12 Mr. Kimelman -- which mean theories of guilt -- and
13 theories of exculpability which were offered by each
14 of the defendants -- which mean their arguments to
15 show that their clients are not guilty -- or, as I
16 like to put it, the failure of the Government to
17 prove the guilt of the defendant.

18 Matters stricken from the record are not a
19 part of the record, and so if I directed the
20 reporter to physically strike it from the court
21 record you are to figuratively strike it from your
22 memory and recollection.

23 (Cont'd on next page.)
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2 Any random remark you may have heard in the
3 courtroom is not a part of the record, just disregard
4 it. If I made a statement, it is not evidence, just
5 disregard it, and while I am at it, if I asked a ques-
6 tion, it should have no greater significance to you
7 than any other question asked; if you thought it was a
8 silly question, disregard it, don't hesitate at all.
9 The only reason I ask a question is that at times
10 I may find there is something a little fudgy and
11 uncertain in my own mind and I assume; if it is so in
12 my own mind then it is probably in your mind, so I ask
13 the question. It may be perfectly clear to you but it
14 was confusing to me. I did not ask it because I wanted
15 to bring out a particular bit of evidence.

16 There are times that the Court sustained objec-
17 tions to questions. You may not speculate on what the
18 answer might have been if I had permitted the witness
19 to answer. The point is I ruled as a matter of law
20 that it should not be in this case and it is not in
21 the case.

22 There are times that a lawyer asks a question
23 and incorporates a statement in the question that
24 wasn't supported in the record and the witness answered
25 no. Well, you cannot assume that what the lawyer said

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2 was true just because the lawyer incorporated that
3 statement in the question. You see, lawyers test the
4 credibility of witnesses and they may put questions to
5 the witnesses that do not have support in the record.
6 It is a way of testing credibility and is perfectly
7 proper.

8 I might say that in cross-examining a character
9 witness Mr. Kimelman asked, "Have you heard that Mr.
10 Bermudez was arrested on a marijuana charge?"

11 The two witnesses who came as character
12 witnesses said no. Well, that was offered for a
13 very specific purpose, first to see what the witnesses
14 knew about Mr. Bermudez' general reputation, and if
15 the witnesses had answered in the affirmative, to
16 determine whether it affected his character. If the
17 witness said no, you may not assume in any way that he
18 was arrested, there is no proof in the record that he
19 was.

20 You, the jurors, are the sole judges of the
21 credibility of the witnesses, which means the believe-
22 ability of their testimony and the weight their
23 testimony deserves. Scrutinize the testimony given
24 and the circumstances under which each witness
25 testified and every matter in evidence which tends
to show whether a witness is worthy of belief. Con-
sider each witness'

1 intelligence, language difficulty, the witness'
2 demeanor on the witness stand. Did he answer fully,
3 forthrightly? Was he evasive?
4

5 In that connection, of course, you understand
6 that where a witness is directed to answer yes or no
7 there are difficulties sometimes in answering yes or
8 no. Use your good common sense on that. The lawyers
9 have a right to control the cross-examination, there
10 is nothing wrong with that. If witnesses were allowed
11 to talk on and on on everything they like to say, you
12 recognize that we would have pure chaos. So the control
13 of cross-examination by counsel is very important for
14 an orderly presentation of the case.

15 Take into consideration the witness' ability
16 to observe the matters as to which he has testified,
17 whether he or she shall have impressed you as having
18 an accurate recollection of these matters.

19 Take into consideration the relation each
20 witness might bear to either side of the case, the
21 manner in which each witness might be affected by the
22 verdict, the extent to which the witness is corroborated,
23 supported, that means, and the extent to which a witness
24 is contradicted by other evidence in the case.

25 I cannot recall whether a witness was faced

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2 with a prior inconsistent statement during this trial,
3 and that is what we call impeaching a witness, which
4 means that a lawyer may ask a witness whether at a
5 previous time he made a statement that is different
6 than the testimony he gave before you. Well, as
7 jurors, you decide whether the prior statement was
8 inconsistent with the testimony, you decide whether it
9 was just a normal variation in retelling the story,
10 you decide whether it is inconsistent as to a
11 material matter, then you determine the effect the
12 prior inconsistent statement has on the credibility
13 of that witness.

14 We had a number of expert witnesses, one was
15 Special Agent Abbott and the other two were chemists,
16 Mr. Weber and Mr. Sawinski. They expressed an opinion
17 as to what a particular substance was. Now normally,
18 witnesses, lay witnesses, may only tell the jury what
19 they saw or heard. A lay witness cannot say to you,
20 for example, "I think," or, "It probably is," or "It
21 probably was." That is an opinion, that is a con-
22 clusion. But exceptions to that rule exist as to
23 those whom we call expert witnesses. These are wit-
24 nesses who, by education and experience, have become
25 expert in some art, science, profession or calling.

1
2 Such a person may state an opinion as to relevant and
3 material matter which they profess to be experts in,
4 and they may also state their reasons for the opinion,
5 as Mr. Weber and Mr. Sawinski spoke about the
6 experiences they both had in analyzing cocaine as
7 chemists.

8 Mr. Abbott said he had some instruction, as I
9 recall, at some Drug Enforcement Administration
10 School, or it may have been the agency that preceded
11 that agency; and then he said that throughout his
12 work, through his experience, he was able to express
13 an opinion as to what a particular substance was.

14 Now, the mere fact that I determined that a
15 witness is qualified to express an opinion doesn't
16 mean you have to take that opinion. You can disregard
17 it if you feel he wasn't qualified and that he shouldn't
18 even have come before you. I don't pass on the
19 weight of the testimony, I just determine whether you
20 should see it at all and you determine whether you
21 will give the expert opinion any weight. The expert
22 witness' opinion should be weighed, and you weigh it
23 just like any other testimony. All the factors I
24 have just suggested to you concerning weighing the
25 credibility, the believability of witnesses, applies
to expert witnesses, of course.

1 While we are on the question of expert
2 witnesses and while their testimony relates to
3 substances that were admitted into evidence, I
4 charge you that you may consider the circumstantial
5 evidence concerning the substances that were admitted
6 into evidence and the substance that Special Agent
7 Abbott testified to concerning Count Two on November 20,
8 1973. As circumstantial evidence you may consider
9 the price paid, if you credit the testimony, or the
10 price negotiated, the use of code names, the surrepti-
11 tious manner in which the parties negotiated, the
12 surreptitious and secret manner, if you believe it
13 was, in which their meetings were conducted. All of
14 these are circumstances that you may consider in
15 arriving at a determination on what the substance is.
16 In other words, the Government must prove that the
17 substance was cocaine and prove it beyond a reasonable
18 doubt. But that proof does not require, and it is not
19 essential to support a determination that the substance
20 was cocaine, that expert opinion be presented; you
21 can make such a determination based on all the
22 evidence in the case.
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25 (Cont'd on next page.)

Charge of the Court

JB:GA

T:RI PM

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2 In this case, the defendant Bermudez and the
3 defendant Diaz-Martinez took the stand and testified.

4 A defendant who wishes to testify is competent
5 as a witness. You must judge the credibility of his
6 testimony in the same manner as any other witness.

7 The defendant Jorge Vivas did not take the stand.
8 The law does not compel a defendant in a criminal case
9 to take the witness stand and testify. No presumption
10 of guilt may be raised, and no unfavorable inference of
11 any kind may be drawn by the failure of a defendant to
12 testify.

13 A defendant who has been previously charged may
14 rely on the failure of the Government to prove its case.
15 It would be improper for you to discuss the failure of
16 the defendant Vivas to take the stand.

17 Now, Mr. Dias presented three witnesses as char-
18 acter witnesses: The Reverend Hipolito Melendez and
19 Alcira Gaitan and Mercedes Gaitan --

20 MR. MAHLER: You~ Honor, those were Bermudez's
21 witnesses.

22 THE COURT: I am sorry. I am glad you told me.
23 And the jurors recall it better than I do. They were
24 shaking their heads.

25 Bermudez.

Where the defendant has offered evidence of good general reputation for truth and veracity or honesty and integrity, or as a law abiding citizen, the jury may consider such evidence in the case. Evidence of the defendant's reputation inconsistent with those traits of character ordinarily involved in the commission of the crime charged may give rise to a reasonable doubt, since the jury may think it's improbable that a person of good character and with respect to those traits would commit such a crime.

Now, Manuel Fiffe and Luis Felipe-Miranda testified that they participated in the crime charged. They do not become incompetent to testify in the trial because they say they participated in the crime charged. They are classified as alleged accomplices.

The testimony of an alleged accomplice alone, if believed by the jury, may be of sufficient weight to sustain a verdict of guilty, even though not corroborated, or supported by other evidence.

Now, whether or not their testimony is corroborated or supported by other evidence is a question for you to decide. But I am Charging that even if Fiffe's and Miranda's testimony as alleged accomplices is not corroborated or supported by other evidence, their testimony

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Charge of the Court

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alone is enough to support a verdict of guilty. However, the jury should keep in mind that such testimony is always to be received with caution and weighed with great care. Their testimony is not to be considered by you as you might consider any ordinary layman's testimony. You must recognize that they say they participated in the crime charged. You should never convict a defendant upon the unsupported testimony of an alleged accomplice unless you believe such unsupported testimony to be true beyond a reasonable doubt.

Mr. Miranda was convicted of a felony. That means he was convicted of a crime that is punishable by a prison term of more than one year. A prior conviction does not render a witness incompetent to testify, but is merely a circumstance which you may take into consideration in determining the credibility of the witness. It is the province of the jury and the jury alone to determine the weight to be given to the prior conviction.

If a witness is shown to have testified falsely as to a material fact knowingly, you may disregard all that witness' testimony, on the theory he is unworthy -- he or she is unworthy of belief. On the other hand, the jury has discretion to accept the portion of that witness' testimony that the jury believes is credible. That

Charge of the Court

principle underscores the wide discretion the jury has in weighing the credibility of witnesses.

Evidence was offered of the seizure of certain substances and equipment pursuant to a search warrant, from the home of Jorge Vivas on June 14, 1974.

Now, I charge you that as a matter of law it was after the Conspiracy terminated, and is not chargeable in any way against the defendant Bermudez, or Diaz-Martinez. And it's offered for a very limited purpose against the defendant Vivas. You are not to be concerned as to whether the equipment, the substance was evidence of another crime. The only purpose it's offered, if you find it credible, and you find it relevant to the issue, is to determine whether it is some proof that the defendant Vivas entered into the Conspiracy charged in this indictment, and for no other reason.

There was also some proof and some discussion on the obligation, putting it in the negative, or impropriety of a lawyer going over testimony with witnesses he calls to the witness stand. I Charged you during the trial that it is improper for a lawyer to suggest in any way what a witness should testify to. In other words, tell him the testimony the lawyer wants.

It is perfectly proper for a lawyer to ask a witness

Charge of the Court

what he knows about the case, to go over that testimony with the prospective witness, to go over it in question and answer form.

And it's my opinion that a lawyer has the obligation of doing that to properly prepare for trial.

We turn to the Charge in the Indictment. Now, if you compare the Indictment with the Memorandum of Verdict you will find other names mentioned. Well, the other names have been identified as Fiffe, Blanco and Miranda. The testimony is that Fiffe and Miranda pleaded guilty. There is no evidence in the record as to why Blanco is not before you. And that's not for your consideration. It's not your concern.

The defendants before you are Bermudez, Vivas and Martinez. And the question before you is whether the Government proved the guilt of the defendant by proof beyond a reasonable doubt. But I will read the indictment in its original form, and you will have it before you.

Count One says:

"On or about between the 31st day of October, 1973 and the 1st day of May, 1974, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendants Eduardo Bermudez, Jorge

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2 Vivas also known as Jorge Posos, Israel Diaz-Martinez,
3 Manuel Fiffe also known as Pfiefel, Victor Blanco also
4 known as Red, and Luis Felipe Miranda, together with
5 Juanita Diaz also known as Jenny, herein named as a co-
6 Conspirator but not as a defendant, and other, did know-
7 ingly and intentionally conspire to violate Section 841
8 (a) (1) of Title 21, United States Code.

9
10 "1. It was a part of said conspiracy that the
11 defendants and co-conspirators would knowingly and in-
12 tentiously distribute and possess with intent to dis-
13 tribute cocaine hydrochloride, a Schedule II narcotic
14 drug controlled substance.

15 "2. It was further a part of said Conspiracy that
16 the defendants and co-Conspirators would conceal the
17 existence of the Conspiracy and would take steps designed
18 to prevent disclosure of their activities," in violation
19 of Title 21, United States Code, Section 846.

20 Now, I think I am at liberty to tell you that Two,
21 Three, Four and Five are excised because they don't refer
22 in any way to these three defendants, but they do refer
23 to Fiffe, Blanco and Miranda. And that's why those
24 numbers are missing.

25 Count Six:

"On or about the 20th day of November, 1973, within

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2 the Eastern District of New York, the defendants Eduardo
3 Bermudez, Jorge Vivas, also known as Jorge Posos, Manuel
4 Fiffe, also known as Pfiefel, and Victor Blanco, also
5 known as Red, did knowingly and intentionally possess
6 with intent to distribute approximately one-half kilogram
7 of cocaine hydrochloride, a Schedule II narcotic drug
8 controlled substance," in violation of Title 21, United
9 States Code, Section 841(a)(1), and Title 18, United
10 States Code, Section 2.

11 Now, the reference in the Indictment to Title 21
12 and Title 18:

13 Title 21 is captioned Food and Drugs. And Title
14 18 is Crimes and Criminal Procedure.

15 The Congress determines what is a crime. And
16 on October 27, 1970, the Drug Abuse Prevention and Control
17 Act of 1970 became law. And it became effective May 1,
18 1971.

19 The Congress as a matter of policy established
20 certain strict controls for the supervision of the
21 importation, manufacture, transportation, sale and dis-
22 tribution of certain drugs.

23 Section 812 of Title 21 established certain
24 Schedules. Cocaine hydrochloride was incorporated in
25 Schedule II. Schedule II established the Schedule on

Charge of the Court

these findings.

"The drug or other substance has a high potential for abuse.

"The drug or other substance has a currently accepted medical use in treatment in the United States or a currently accepted medical use, with severe restrictions.

"Abuse of the drug or other substances may lead to severe psychological or physical dependence."

Under Schedule II(a)(4), it describes the following:

"Cocoa leaves and any salt, compound, derivative, or preparation of cocoa leaves, and any salt, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of these substantives."

(continued on next page.)

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2 And I charge you that cocaine hydrochloride
3 comes within that definition.

4 Congress also provides under Section 841(a)
5 of Title 21 the following:

6 It shall be unlawful for any person knowingly
7 or intentionally to possess with intent to distribute
8 a controlled substance.

9 That is a section upon which Count 6 is based.
10 It's called the substantive count.

11 Count 1, however, is a conspiracy count. And
12 in very brief language, Section 846 describes the
13 conspiracy.

14 It says, "any person who attempts to or conspires
15 to commit an offense defined in this subchapter"
16 violates the section.

17 There is a difference in concept between a
18 conspiracy and what we call a substantive count, violat
19 a specific prohibition, 841, you shall not possess
20 with intent to distribute cocaine, and the conspiracy
21 section which says, it's a violation of law to conspire
22 to enter into a conspiracy to violate the law.

23 You see, that is a general term. So we call
24 it the conspiracy statute, what the law condemns and
25 proscribes, prohibits in a conspiracy is the entering

into the agreement.

It is not necessary for the Government to prove that an accused actually possessed cocaine in the charge of conspiracy to possess cocaine. While the substantive count that charges possession of cocaine with intent to distribute, it's vital to the Government's case to prove that the accused possessed the cocaine. It is just a slight variation of that, when I come to the substantive counts, I will charge you on aiding and abetting, the possession with intent to distribute. But let's deal with the conspiracy count.

What is a conspiracy? It's an agreement. It's an understnading. It's been properly described as a criminal venture similar to a commercial venture. It's an agreement between two or more to commit an unlawful act. Those who are members of the conspiracy are called conspirators.

A conspirator is a kind of partner in the enterprise. A conspiracy is a partnership in a criminal venture in which each member becomes the agent of every other member.

Mere association, the being together of two people, the mere similarity of their conduct does not make for a criminal conspiracy. People have a right

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2 to assemble to discuss matters. If you find one party
3 to have been a member of a conspiracy, the mere fact
4 that the accused associated with that member is not
5 enough. The mere fact that an accused was present
6 at the time the conspiracy was in operation and even
7 knew of the conspiracy is not enough.

8 You'll see that it is necessary for the
9 Government to prove beyond a reasonable doubt that the
10 accused participated, in some way entered the
11 conspiracy, promoted the business of the conspiracy
12 before you can say that an accused became a member of
13 the conspiracy.

14 More than that, the Government must prove beyond
15 a reasonable doubt that that activity, that that
16 participation was knowing and willful.

17 In other words, that the accused was aware that
18 the parties were dealing in cocaine. And that knowing
19 that the parties were dealing in cocaine voluntarily
20 and intentionally entered into the business, the
21 conspiracy, knowing that it was a violation of law.

22 The Government doesn't have to prove that the
23 defendant knew this specific section of law that was
24 violated, but knew that it was a violation of law to
25 deal in cocaine. It is not necessary for the Governme

Charge

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2 to prove that the parties sat down and entered a
3 formal agreement; that the parties knew all the methods
4 that the business was to use in order to succeed to
5 accomplish the purpose. It is not necessary for the
6 Government to prove that the conspirators knew one
7 another. All that must be proved is that the members
8 in some way or some manner -- and it could be the
9 manner in which they dealt -- the Government must prove
10 beyond a reasonable doubt that the members of the
11 conspiracy in some way or some manner or through
12 some contrivance positively or tacitly came to a mutual
13 understanding to try to accomplish the unlawful scheme
14 or plan, in this case, the dealing in narcotics.

15 What the evidence in the case must establish
16 beyond a reasonable doubt is that the conspiracy was
17 knowingly formed; that the parties to the conspiracy
18 were aware that they were dealing in cocaine, and that
19 one or more of the means or methods described in the
20 indictment were agreed upon to be used in an effort
21 to accomplish that purpose.

22 In order to bring an accused into the conspiracy,
23 once the Government proves the conspiracy as alleged
24 in the indictment is established, the Government must
25 prove beyond a reasonable doubt that the accused

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knowingly and willfully entered into that conspiracy; that knowing the unlawful plan, that he advised, assisted or does something that aids the conspiracy in its business.

Now, one who knowingly and willfully joined an existing conspiracy is chargeable with all the activities of the conspiracy from the beginning.

In determining whether a conspiracy existed, the jury should consider the actions of all the alleged participants. However, in determining whether a particular accused became a member of the conspiracy, you may consider only that accused acts and statements. In other words, if the witness Fiffe testified he spoke with Miranda or Mr. Blanco and one of the accused names were mentioned or his activities described, you may not use that testimony to determine whether the accused entered into the conspiracy. And you shouldn't confuse that with what I charge you on statements made outside the presence of the accused.

You see, criminal liability is a personal liability. The Government must prove by the testimony of what a defendant himself said or did by proof beyond a reasonable doubt in order to bring a defendant into the conspiracy. Now, once he is brought into the

Charge

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2 conspiracy, then anything another member of the
3 conspiracy says or does during the term of the conspiracy
4 and to promote the cocaine business is chargeable against
5 that accused.

6 If you think about it, you will understand the
7 fairness. They are two separate and distinct principles.
8 One is a question of how to deal with the evidence.
9 The other is a question of whether a defendant is a
10 member of the conspiracy. You cannot charge the
11 accused with acts or statements outside his presence
12 of which he knows nothing unless and until you first
13 find that he was a member of the conspiracy. And
14 that in turn depends on whether the testimony supports
15 proof that he entered into the conspiracy, which is
16 another way of saying, testimony of what that accused
17 said or did.

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19 (Continued on next page)

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2 THE COURT: (Continuing.) We talk about
3 conspiracy, we might think of three partners in some
4 business all doing pretty much the same work and
5 sharing equally in the profits.

6 Well, not every legitimate partnership is
7 structured that way. There are partnerships in
8 which there are executives; then you have some
9 partners who are almost like stockholders and we
10 call them limited partnerships.

11 The kind of conspiracy charged here was
12 described as a chain conspiracy. Mr. Kimelman
13 described it and by repeating what he said, it is not
14 intended to give any substance whatsoever or support for
15 his summation or his argument. It is only to
16 describe the type of conspiracy described in this
17 indictment. He described Mr. Fiffe's participation
18 as a distributor, working under the boss of the con-
19 spiracy, Diaz-Martinez; Miranda was a delivery boy and
20 Bermudez and Vivas were suppliers and that Blanco was
21 an intermediary of some kind, a broker, possibly, and
22 that Juanita Guzman, also known as Diaz, kept the
23 cocaine in her apartment and packaged it.

24 In a chain conspiracy different participants
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2 operate at different levels. It is not necessary
3 to prove that the accused knew every level of
4 operation or knew the identity of the individuals
5 performing those duties.

6 It is necessary for the Government to prove
7 that each one in the chain of operation in a chain
8 conspiracy understood that the success of the business,
9 of the conspiracy, depended on each one performing his
10 duties.

11 When the conspiracy terminated is a fact
12 question for the jury. I found as a matter of law
13 that it had already terminated by June 14, 1974. So
14 I instruct you that you cannot find a conspiracy
15 existed on or after June 14, 1974. The important
16 thing is that once the conspiracy terminates then the
17 business is over, then one partner can no longer
18 speak for another. It is only during the period
19 of the conspiracy.

20 In order for the Government to sustain the
21 charge in Count One, the conspiracy charge, the
22 Government must prove all the following essential
23 elements of the crime of conspiracy:

24 One: That the conspiracy described in the
25 indictment was wilfully formed and existing at the

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Charge

time alleged for the purposes alleged in the indictment, to wit, to knowingly and intentionally distribute and possess with intent to distribute, cocaine hydrochloride;

Two: That the accused knowingly and willfully entered into the conspiracy. And I told you that that means that the Government must prove beyond a reasonable doubt that he was aware of what the business of the conspiracy was and being aware of the conspiracy voluntarily and intentionally took part, participated in it, knowing that it was a violation of law;

Three: That one of the conspirators, thereafter knowingly committed an overt act and that means that one of the conspirators, one of the members of the conspiracy, aware of what he was doing, committed an overt act.

An overt act is something that is visual or something that you can hear. It does not necessarily mean that it must be a criminal act. The Government does not have to prove an actual sale. It could be as innocent as or innocent looking or appearing like making a telephone call but if the telephone call is to call a customer or to arrange for a negotiation for a sale and it was done while the co-conspirator

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2 was aware of what he was doing, then it was an act
3 performed by a co-conspirator, a knowing act, and;

4 Fourth: That such overt act was knowingly
5 done and in furtherance of some object or purpose
6 of the conspiracy as charged and again that means
7 that not only must it be done knowingly but it must
8 be something to further the business of the conspiracy.

9 Count Six charges the defendants Bermudez and
10 Vivas with possession of a half a kilo of cocaine
11 hydrochloride.

12 The Government must prove beyond a reasonable
13 doubt that the accused was in possession of approxi-
14 mately a half kilogram of cocaine hydrochloride, the
15 Government does not have to prove the exact amount;

16 Two, that the possession was knowing and
17 intentional and with intent to distribute. In other
18 words, that it is the criminal intent that the
19 Government must prove: first that the accused knew
20 that the substance was cocaine and, of course, vital
21 to that the Government must prove beyond a reasonable
22 doubt that the substance was cocaine; and that the
23 defendant or the accused knew that he was in possession
24 of cocaine, and that it was possessed with intent to
25 distribute. That means that it was not for personal
use, that it was for purpose of sale.

Charge

Now, the law recognizes two types of possession; actual and constructive possession. A person who knowingly has direct physical possession of an article has actual possession.

As I hold my glasses, they are in my direct control, that is actual possession. A person who although not in actual possession knowingly has both the power and intention at a given time to exercise dominion or control over a thing either directly or through another person or persons is then in constructive possession of it.

For example, if my glasses were in my chambers or at the optician and being repaired and I could direct the disposition of it, the return of it, the sale of it, the destruction of it then I have constructive possession.

Now, possession may be sole or joint. If I had the joint funds of Mr. Adler and myself, let us say \$100 belonged to us and I put it in my pocket, that would be joint possession and I would have actual possession and he would have constructive possession.

I charge you that conspiracy, a conspiracy charge is a charge that the accused entered into some agreement to perform an illegal act, while the

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Charge

substantive charge is actually the illegal act.

In a case where two or more persons are charged with the commission of a crime, the guilt of any defendant may be established without proof that he personally did every act constituting the offense.

Section 2 of Title 18 referred to in Count 2, says in part as follows:

"Whoever commits an offense gains the use or aids, abets, counsels, commands, induces or procures its commission is punishable as a principal. Whoever willfully causes an act to be done which if performed by him or another would be an offense against the United States is punishable as a principal."

In other words, every person who willfully participates in the commission of a crime may be found to be guilty of that offense.

Participation is willful if done voluntarily and intentionally and with specific intent to do something which the law forbids. In order to aid and abet another to commit a crime it is necessary that the accused willfully associate himself in some way with the criminal venture and willfully participate in it as he would in something he wishes to bring about. That is to say that he willfully seek by some

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2 act or omission of his to make the criminal venture
3 succeed.

4 You, of course, may not find either defendant
5 guilty of aiding and abetting unless you find beyond
6 a reasonable doubt that every element of the offense
7 as defined in these instructions was committed by
8 some person or persons and that the defendant partici-
9 pated in its commission.

10 Now, that may be confusing. Every time I charge
11 in a conspiracy and I also charge aiding, I say, "I
12 hope it is clear in the jury's mind." It sounds very
13 much like some of the things I said when I talked about
14 the conspiracy.

15 The best way I can define it is on a theoretical
16 basis. In a conspiracy the substantive crime for which
17 the conspiracy has been established need not be proved.
18 It is the agreement between two or more plus an overt
19 act committed knowingly by one of the co-conspirators
20 in furtherance of the conspiracy.

21 In order to find someone guilty of aiding or
22 abetting, the Government must prove beyond a reasonable
23 doubt that that crime for which he is charged with
24 aiding and abetting was committed.

25 In this case, the Government must prove beyond

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2 a reasonable doubt that the crime of possessing with
3 intent to distribute a half kilogram or about a half
4 kilogram of cocaine was committed. Otherwise, the
5 accused could not be found guilty of aiding and
6 abetting.

7 Now, you are about to be excused, you will be
8 going home. There are just a few more instructions
9 and I will excuse you for a few moments while I talk
10 to the lawyers.

11 Something was said about the future of the
12 defendants if you find them guilty. That is not your
13 concern at all. You just determine whether the
14 Government has proved its case beyond a reasonable
15 doubt. Punishment is up to the Court. So you are free
16 from that concern. Do not let it bother you.

17 The verdict must be a unanimous verdict. Each
18 juror must decide the case for himself or herself.

19 The jury verdict, the jury process is a
20 deliberative process, an exchange of ideas, a
21 discussion of the evidence. No juror has the right
22 to refuse to talk to his fellow jurors about the
23 evidence in the case. He violates his oath if he comes
24 to the jury room and says, "I have decided this case
25 and when you ladies and gentlemen agree with me you
will have a verdict."

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2 He cannot take an intransigent position such
3 as that and neither does he have the right to abandon
4 his obligation to decide the case for himself. He
5 will violate his oath if he says, "Well, they call
6 me Goodtime Charlie or Goodtime Sue and I never argue;
7 when you agree on a verdict I will go along with the
8 majority." That is not right either.

9 You should discuss the evidence in the case
10 with a view to arriving at an unanimous verdict. If
11 you have arrived at a tentative verdict and after an
12 exchange of ideas and viewing the evidence you feel you
13 are wrong, you were wrong in the first place, do not
14 hesitate to take a different position.

15 During your deliberations you may have some
16 occasion to communicate with the Court and it will
17 all be done by your foreman. If you want to hear
18 any evidence in the case try to be specific, try to
19 give the subject matter, the witness, if you can,
20 direct or cross.

21 As I indicated, I will not give you the quick
22 response I would like to but I may be otherwise
23 engaged and I would have to release myself from that
24 and then find the material you want. I will read you
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2 what I think you want and nothing else. If you want
3 any of the exhibits ask for them. None will be sent
4 in without request.

5 If you want all exhibits, all exhibits will
6 go in. If you want specific exhibits, ask for them
7 and they will go in.

8 During your deliberations, I am not interested
9 in how you stand at any particular time. I am not
10 interested that you are six-to-six or eight-to-four
11 or eleven-to-one. I am interested in when you have
12 arrived at a unanimous verdict and when you have
13 arrived at a unanimous verdict the foreman will say,
14 "We have a verdict." Do not tell me what it is.

15 I will call you into the courtroom and ask
16 you to stand, Miss Foreman, and I will ask you, "How
17 do you find Eduardo Bermudez, guilty or not guilty?
18 How do you find Vivas, guilty or not guilty, or
19 Martinez, guilty or not guilty?"

20 Then I will go to Count 6, "How do you find
21 Bermudez, guilty or not guilty,"etc. and you will render
22 your verdict. Then I will- ask Juror No. 2, "Did
23 you hear the verdict rendered by your Foreman; is
24 that your verdict?" And so on up to 12. When everyone
25 has answered in open court and said, "Yes," then we

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Charge

know it is the verdict of this trial and it becomes a verdict.

I would ask you to leave the courtroom for just a few moments, I want to talk to the lawyers and then I will call you back into the courtroom.

(The jury withdrew from the courtroom at 5:35 o'clock p.m.)

THE COURT: Judge Harold Stevens is in my chambers. I had an appointment with him at 5:30. I would like to go in and tell him that I have to come back and take some exceptions to the charge, if you have them.

Are there exceptions?

MR. KIMELMAN: I have no exceptions.

MR. MATARAZZO: I have no exceptions to the charge.

MR. MAHLER: I have two.

THE COURT: How long will you take?

MR. SUTTON: A few minutes.

MR. MAHLER: Just a couple of minutes.

THE COURT: Let me tell him I will be with him in five or ten minutes.

(After recess. Out of the hearing of the jury.)

MR. SUTTON: I respectfully suggest, your Honor,

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Charge

and take exception to the charge with respect to the expert that you had ruled as a matter of law that these -- Mr. Abbott, the two chemists were experts.

Could you expand as you did at the trial itself where you said your opinion at the point as a matter of law that they were expert has nothing to do with whether they are experts and that's solely a fact question which the jury has to consider and determine based upon what they have heard in the evidence.

THE COURT: Anything else?

MR. SUTTON: I respectfully except to that charge that circumstantial evidence, which you gave three examples, would solely be a basis upon which to find that the item under the conspiracy count was cocaine.

I respectfully submit that the items that you have given are not inclusive, not sufficient, misleading and that in fact there must be a finding that the item that they are charged with is in fact cocaine and that they must find it was cocaine hydrochloride that they had the conspiracy about, that the agreement as to the conspiracy charge was as to possession to distribute the cocaine, if they find

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Charge

Mr. Abbott could not in fact tell just by looking or the tests he made and simply that --

THE COURT: This is the charge you want me to give them.

MR. SUTTON: These are the objections I am making; if you want I can give it to you. I didn't write it down.

THE COURT: What you are saying is I didn't charge them the Government must prove it is cocaine.

MR. SUTTON: It is my opinion that I don't believe you have expressed sufficiently clearly --

THE COURT: Did I say the Government must prove it is cocaine on the substantive count?

MR. SUTTON: Yes.

THE COURT: You are saying the Government must prove this by expert testimony?

MR. SUTTON: As to the substantive count, yes.

THE COURT: It may not be proved by circumstantial evidence. Is that what you are saying?

MR. SUTTON: What I say is that the circumstantial evidence examples which you have given are certainly not inclusive and I do say additionally to that that these factors that you have given to the circumstantial are not --

1
2 THE COURT: Anything else?

3 Go to the next thing.

4 MR. SUTTON: I except to your statement to
5 the jury where you told them you are not to concern
6 yourself why Blanco is not before you. I believe the
7 evidence is before you that Blanco pleaded guilty.
8 Mr. Vivas stated they made the same deal with
9 Miranda.

10 THE COURT: Is it true they said Blanco
11 pleaded guilty?

12 MR. KIMELMAN: The testimony to my recollection
13 is they all sat down with the lawyers and they all
14 decided to plead guilty but I don't believe there is
15 any testimony beyond that.

16 Mr. Blanco went ahead and pleaded guilty.

17 MR. MAHLER: I'd object to a charge like that.

18 THE COURT: If it is in the evidence why should
19 I not tell them Blanco pleaded guilty? I forgot
20 there was any testimony that he pleaded guilty.

21 MR. KIMELMAN: There is testimony that they
22 all sat down and decided to plead guilty.

23 THE COURT: I will tell them that. I don't
24 know how it will help you. If it is in the evidence,
25

1
2 I will tell them.

3 MR. SUTTON: What I have before me is you said
4 why Blanco was not before you.

5 THE COURT: You have won your point.

6 MR. SUTTON: I may withdraw the point.

7 THE COURT: You want to argue it and withdraw
8 it?

9 MR. SUTTON: There may have been a confusion
10 by the jury, this is the point I am trying to make.
11 I made a point on summation as to Blanco for testi-
12 monial purposes. You have taken this to mean about
13 Blanco for pleading purposes.

14 THE COURT: What do you want me to do? I said
15 I will tell them Blanco pleaded guilty. He is still
16 not before them. I will tell them Blanco pleaded
17 guilty because it is in the testimony.

18 Do you want that?

19 MR. SUTTON: May the --

20 THE COURT: Next point.

21 MR. KIMELMAN: Something came to my mind. You
22 also qualified, I believe, Special Agent Greenan as an
23 expert --

24 THE COURT: Greenan?

25 MR. KIMELMAN: Yes, as an expert to determine

1
2 these were implements used in the cocaine business,
3 the scissors from Mr. Vivas' house.

4 THE COURT: I am not going back over that.
5 I know I didn't.

6 MR. SUTTON: I except to your reading the
7 statute literally.

8 THE COURT: You don't want me to read it? They
9 shouldn't know it? Go ahead.

10 MR. SUTTON: You charged at one point that the
11 agreement was to be as to a criminal venture to commit
12 an unlawful act.

13 I would respectfully ask that the unlawful
14 act be the specific unlawful act of the intent to
15 possess, of the possession with intent to distribute
16 cocaine hydrochloride.

17 THE COURT: I read that at one point in the
18 charge.

19 MR. SUTTON: Another point you omitted and
20 there might be a confusion.

21 THE COURT: Go ahead.

22 MR. SUTTON: You spoke of a chain of conspiracy,
23 a chain conspiracy. I would respectfully submit that
24 it should -- these words should have been preceded
25 by the word, "alleged" chain conspiracy.

17

Charge

THE COURT: Next.

MR. SUTTON: I except to your charging with respect to your example on constructive possession using your glasses as the example.

It raises the question --

THE COURT: Should I have used your glasses?

MR. SUTTON: No.

It raises the question of ownership and therefore, there should be a charge that the defendants must be found beyond a reasonable doubt to own, to have owned the cocaine.

THE COURT: Next.

MR. SUTTON: That's all I have.

THE COURT: All the exceptions are denied except that I will charge them that -- I will remind that them Blanco pleaded guilty.

MR. MAHLER: I object to that portion of your charge concerning the weight to be given to the testimony of the co-conspirators and I request that you charge in the language of United States v. Padgett and United States v. Gonzalez.

THE COURT: Denied.

MR. MAHLER: I request a charge that the defendant Diaz is not charged with the possession

18 of any of the physical items which appear in front
of the jury on the Government's table.

THE COURT: Denied. That's another summation.
If I sum up for the defendant I will have to sum up
for the Government.

Didn't you tell that to the jury?

MR. MAHLER: No.

THE COURT: You should have done that.

MR. MAHLER: I ask your Honor to charge, as
the theory I have submitted to you in my second request,
to charge simply that the jury must find beyond a
reasonable doubt that the -- all the illicit acts
described are part of one conspiracy not portions of
two conspiracies.

THE COURT: No.

I wish I had the latest case but I don't have
time to look it up, where a judge charged he had to
charge on a single conspiracy and they said it was
too favorable.

Charges like that do nothing but confuse
jurors. If there is a case where the evidence fairly
would demonstrate multiple conspiracy I'd be glad
to do it.

Where it isn't there, I am not dragging in
unnecessary and confusing concepts. Our Court of

1
2 Appeals' judges have been struggling with it. I am
3 trying to figure out what they mean by it.

4 Anything else?

5 MR. MAHLER: This is a problem not a request
6 to charge. But we have submitted a copy of the
7 indictment and it, of course, lists Juanita Dias as
8 the name of the party known as Jenny.

9 THE COURT: That's why in my memorandum of
10 verdict I said Juanita Guzman, known as Juanita Diaz.

11 MR. MAHLER: I ask you to instruct the jury
12 as to what it is.

13 THE COURT: I said they determine fact
14 questions. I already told them that. They already
15 understand. I will do the right thing.

16 Call the jury in, please.

17 (The jury entered the court room at 5:46
18 O'clock p.m.)

19
20 (Cont'd next page.)
21
22
23
24
25

1 (At 5:46 o'clock p.m., the jury took its
2 place in the jury box.)

3 THE COURT: Members of the jury:

4 I told you that it wasn't your concern that
5 Mr. Blanco wasn't before you. I think I also said
6 that you don't know what happened with Mr. Blanco's
7 case. I may have said something like that. But it was
8 called to my attention that there is evidence that
9 Mr. Blanco pleaded guilty in this case, and also
10 evidence that Fiffe, Blanco and Miranda had been in
11 communication with each other, when they offered the
12 plea.

13 Now, I just remind you of that, so that you
14 know there is evidence of Mr. Blanco's relationship
15 to this case, and I had overlooked it.

16 But again, I say the action is United States
17 of America against Eduard Bermudez, Jorge Vivas,
18 and Israel Diaz Martinez, and your consideration is
19 directed to the three defendants before you.

20 At this point, we will suspend now till
21 tomorrow when you will come in again.

22 Don't talk about the case when you come in
23 tomorrow, don't talk about the case. I will give you
24 further instructions when you get in, I will call you
25 into the courtroom. There are certain formalities
that have to be complied with, and then, soon after

1 ten o'clock, you will start your deliberations.

2 Don't think about the case, don't talk about
3 it until tomorrow.

4 Please leave the papers that I gave you, the
5 Memorandum of Verdict, and a copy of Count 1 and 6
6 in the jury room. The jury room will be locked, and
7 you will find them tomorrow morning when you come in.

8 The jury is excused.

9 JUROR NO. 4: What time tomorrow?

10 THE COURT: Ten o'clock.

11 I am glad you asked me, you know that means
12 ten of ten and so forth. All right.

13 Ten o'clock tomorrow, if I am not in the court-
14 room I am going to be across the hall, I will be in
15 the other courtroom.

16 (The jury then left the courtroom.)

17 MR. MAHLER: May the record simply reflect
18 my exception to your refusal to charge?

19 THE COURT: All requests that are not granted
20 by the Court, are excepted to. The rights of the
21 defendants to review are specific, we understand that.

22 MR. MAHLER: Thank you.

23 (At 5:50 o'clock P.M., the session was concluded.)

24 *This is a certified
25 Manuscript of the
Michael Mile

CHARGE

MM:jk

(At 5:02 p.m., out of hearing of the jury.)

THE COURT: The jury has sent a note out, "A written charge of what is a conspiracy." Mark that as a Court exhibit.

THE CLERK: Court Exhibit '11.

THE COURT: Any objection to submitting a written charge on definition of conspiracy to a jury?

MR. SUTTON: My instinct tells me to object.

THE COURT: How do you feel about it?

MR. MATARAZZO: No objection.

MR. MAHLER: I would like to see what the charge is.

THE COURT: Do you have any objection to a written charge given to the jury on conspiracy separate and apart from the rest of the charge.

MR. MAHLER: No.

MR. KIMELMAN: No.

THE COURT: I think it would be perfectly all right.

The only thing I don't have here is the charge.

I have another note, "Business cards of the record shop."

May I see what I said in the transcript?

Here is one business card.

MR. KIMELMAN: It is not quite clear.

2 1 THE COURT: It says business cards of the
2 record shop.

3 MR. KIMELMAN: One business card of the record
4 shop and one card in evidence with number and Jorge.

5 The number of the record shop.

6 THE COURT: Just send that in and see if they
7 are satisfied.

8 What exhibit is that going in as or what is the
9 number?

10 MR. KIMELMAN: 22.

11 THE COURT: Give it to the marshal.

12 THE COURT: If they want more, if they ask
13 questions tell them to put it on a note.

14 THE CLERK: Jury note marked as Court Exhibit 12.

15 THE COURT: I am going to try to talk them out
16 of this because I have an uneasy feeling that they
17 may look at this printed word and take a phrase. If
18 the whole charge were given to them I probably would
19 feel a little better about it but one part of the
20 charge I am a little concerned about.

21 (The jury entered the courtroom at 5:30 p.m.)

22 THE COURT: I would like to comply with your
23 request to give you a written charge on conspiracy but
24 I have certain fears about giving a written charge on
25 part of the charge.

3 1 I might emphasize that there might be one phrase
2 in it that you might hang onto. One juror might read
3 the charge and another juror might not. Here I know all
4 of the jurors will hear it. I would rather repeat or
5 practically repeat what I said before and fortunately
6 it has just come up from the court reporter and it has
7 not been collated so I will just read it and turn the
8 pages slowly so I don't upset the order.

9 "Count 1, however, is a conspiracy count. And
10 in very brief language, Section 846 describes the
11 conspiracy. It says any person who attempts to or
12 conspires to commit an offense defined under this
13 subject chapter violates the section. There is a
14 difference in concept between a conspiracy and what we
15 call a substantive count, violating a specific section,
16 841. You shall not possess with intent to distribute,
17 and the conspiracy section which says it is a violation
18 of law to conspire to enter into a conspiracy to
19 violate the law. You see that is a general term, so
20 we call it conspiracy statute. What the law condemns
21 and proscribes, prohibits in a conspiracy is entering
22 into the agreement. It is not necessary for the
23 Government to prove that an accused actually possessed
24 cocaine in the charge of conspiracy to possess cocaine.

1 While substantive count that charges possession of
2 cocaine with the intent to distribute, it is vital to
3 the Government's case that the accused possess cocaine.
4 It is just a slight variation of that when I come to
5 the substantive count, and I shall charge you on aiding
6 and abetting the possession with intent to distribute.

7 Let us deal with the conspiracy count. What is
8 a conspiracy? It is an agreement, it is an under-
9 standing.

10 It has been properly described as a criminal
11 venture similar to a commercial venture. It is an
12 agreement between two or more to commit an unlawful
13 act. Those who are members of the conspiracy are
14 called conspirators. A conspirator is a kind of a
15 partner in the enterprise. A conspiracy is a partner-
16 ship in a criminal venture in which the acts each
17 member becomes the act of every other member. Mere
18 association, the being together of two people, the
19 mere similarity of their conduct does not make for a
20 criminal conspiracy.

21 People have a right to assemble to discuss
22 matters. If you find one party to have been a member
23 of a conspiracy, the mere fact that the accused
24 associated with that member is not enough.

25 The mere fact that an accused was present at

5 1 the time the conspiracy was in operation and even knew
2 of the conspiracy is not enough. You will see that it
3 is necessary for the Government to prove beyond a
4 reasonable doubt the accused participated in some way,
5 entered the conspiracy, promoted the business of the
6 conspiracy before you can say that an accused became
7 a member of the conspiracy.

8 More than that, the Government must prove
9 beyond a reasonable doubt the activity, that that
10 participation was knowing and willful. In other words,
11 that the accused was aware that the parties were
12 dealing in cocaine and that knowing that the parties
13 were dealing in cocaine voluntarily and intentionally
14 entered into the business, the conspiracy, knowing
15 that it was in violation of law.

16 The Government does not have to prove that the
17 defendant knew this specific section of law was
18 violated but knew that it was a violation of law to
19 deal in cocaine. It is not necessary for the Govern-
20 ment to prove that the parties sat down and entered
21 into any formal agreement, that the parties knew all
22 the methods that the business was used in order to
23 succeed to accomplish the purpose. It is not necessary
24 for the Government to prove that the conspirators
25 knew one another. All that must be proved is that the

1 members in some way or manner, and it could be the
2 manner in which they dealt, the Government must prove
3 beyond a reasonable doubt that the members of the
4 conspiracy in some way or some manner or some contri-
5 vance, positively or tacitly came to a mutual under-
6 standing to try to accomplish the unlawful scheme or
7 plan, in this case the dealing in narcotics.

8 What the evidence in the case must establish
9 beyond a reasonable doubt is the conspiracy was know-
10 ingly formed, that the parties to the conspiracy were
11 aware that they were dealing in cocaine, that one or
12 more of the methods described in the indictment were
13 agreed upon in an effort to accomplish that purpose.

14 In order to bring the accused into the
15 conspiracy, once the Government proves the conspiracy
16 as alleged in the indictment is established, the Govern-
17 ment must prove beyond a reasonable doubt that the
18 accused knowingly and willfully entered into that
19 conspiracy, that knowing the unlawful plan, that he
20 advised, assisted or does something that aids the
21 conspiracy in its business.

22 Now, one who knowingly and willfully joins an
23 existing conspiracy is chargeable with all the
24 activities of the conspiracy from the beginning. In
25 determining whether a conspiracy existed, the jury

1 should consider the actions of all the alleged
2 participants; however, in determining whether a
3 particular accused became a member of the conspiracy,
4 you may consider only his acts and statements.

5 In other words, if the witness Fiffe testified
6 he spoke with Miranda or Mr. Bianco and one of the
7 accused's names were mentioned or his activities
8 described, you may not use that testimony to determine
9 whether the accused entered into the conspiracy and
10 you should not confuse that with what I charge you on
11 statements made outside the presence of the accused.

12 You see, criminal liability is a personal
13 liability. The Government must prove by the testimony
14 of what a defendant himself said or did by proof
15 beyond a reasonable doubt in order to bring a member,
16 a defendant, into the conspiracy. Once he is brought
17 into the conspiracy and here I don't have the copy,
18 once he is brought into the conspiracy then as a
19 partner of the conspiracy he is bound by any acts or
20 declarations of any member of the conspiracy made during
21 the time of the conspiracy and in furtherance of the
22 objectives of the conspiracy, and you must distinguish
23 between those two ideas: One, as an evidentiary
24 matter, how to deal with the evidence, but before you
25 treat the evidence in that fashion, you must find
that a defendant entered into the conspiracy,

8 1 was actually a partner, a member of the conspiracy
2 because until that time he is not bound by anything
3 that any member says outside his presence without his
4 knowledge.

5 Now I hope that clears it up. The jury is
6 excused.

7 (The jury withdrew at 5:40 p.m.)

8 THE COURT: I apologize, the last page was
9 hidden here. It is here with a note. Here is what I
10 said and I don't think it is different than what I just
11 told them. I said once he is brought into the
12 conspiracy then anything another member of the
13 conspiracy says or does during the time of the
14 conspiracy and to promote the cocaine business is
15 chargeable against that accused.

16 If you think about it you will understand the
17 fairness. There are two separate and distinct
18 principles: One is how to deal with the evidence and
19 the other is whether the defendant is a member of the
20 conspiracy. You cannot charge an accused of a
21 conspiracy outside of his presence of which he knows
22 nothing -- it should have been which he knows nothing,
23 unless and until you first find that he was a member
24 of the conspiracy and that in turn depends on whether
25 the testimony supports the proof that he entered into

1 THE CLERK: Note from jury marked Court Exhibit 19
2 for identification.

3 (Out of hearing of the jury.)

4 THE COURT: The note is: "Charge, what is a
5 conspiracy?"

6 I will make one more try at it. Apparently what I
7 told them before --

8 MR. SUTTON: Maybe if I get my briefcase I can
9 say something.

10 THE COURT: Apparently they don't understand it.
11 I read from the -- isn't this where I read directly
12 from the charge book?

13 I charged them in some of the language I usually
14 use. They wanted it in writing and instead I read it
15 to them. I will try to give it to them in layman's
16 language once more.

17 Seat the jury.

18 (The jury entered the courtroom at 3:51 p.m.)

19 THE COURT: Well, your last note asked me to
20 define conspiracy. I have given you a definition a
21 number of times and I will try again by saying it
22 differently, but, of course, always meaning the same
23 thing. It might be helpful to describe it by
24 distinguishing it.

25 When a defendant or an accused is charged with

1 doing something to violate the law, normally it is a
2 specific section. You are prohibited from doing some-
3 thing. When the charge is that the accused did some-
4 thing, that charge is, we call a violation, a
5 substantive violation and so in this case, in Count 6,
6 the defendant Bermudez and Vivas are charged with the
7 possession of cocaine. I indicated that type of
8 possession was the kind of possession that charged them
9 with dealing in it, and the possession was possession
10 with intent to distribute.

11 The statute says it is unlawful to possess
12 cocaine with intent to distribute, and, of course, I
13 am not giving you the full charge because the
14 Government has to prove that that possession was knowing-
15 ly and willfully, they are aware of it and that is one
16 type of a crime. That is a substantive offense.

17 What Congress makes a violation is the getting
18 together for the purpose of violating the law with
19 intent to violate the law, so that it isn't the
20 possession of the cocaine that is prohibited in 846,
21 though as I say that is a violation, but it is the
22 getting together for the purpose of dealing in cocaine
23 and the phrase used in the indictment is possession with
24 intent to distribute cocaine; but that is what is meant
25 by it.

1 Now, a conspiracy obviously takes two or more
2 people. That is a difference, another difference
3 between conspiracy and the substantive crime, because
4 it is a getting together. We call it an agreement.

5 The Government must prove that two or more
6 people and at least one of the accused got together
7 for the purpose of going into the cocaine business.

8 Now, I also charge you to make sure that the
9 Government's proof must show a conspiracy and not
10 people -- not just getting together and talking
11 about non-criminal activities. Make sure that the
12 accused didn't just happen to be there innocently
13 or by accident. Before you convict anyone for being
14 a part of the group that is dealing in cocaine, the
15 Government must prove that the party charged, the
16 accused, knew that what he was doing, his activity
17 if he sat down to talk to someone, if he got on the
18 telephone and talked about something, if he drove
19 in the car, if he sat down with a prospective buyer,
20 that he knew it was part of that group's activity
21 to deal in the cocaine.

22 Again, that it wasn't by pure accident.

23 When I talked about what the Government has
24 to prove beyond a reasonable doubt I pointed out
25 all the elements of conspiracy that the Government

1 has to prove:

2 One, that there was a conspiracy as charged in
3 the indictment. The conspiracy in the indictment
4 charges that first, the time -- it is on or about and
5 between the 31st day of October of 1973 and the 31st
6 day of May of 1974, and the purpose, again, as I say,
7 was to deal in cocaine.

8 The Government must establish that, by proof
9 of what all the alleged conspirators said and did,
10 as if you view their activities and found, from what
11 they said, and from how they said it, the way they
12 dealt with each other. Did the Government prove
13 beyond a reasonable doubt that they were in the
14 cocaine business? That is one element.

15 Number two, that the particular defendant, the
16 accused charged, knowingly and willfully entered into
17 that conspiracy. The proof through the testimony of
18 what that defendant did must show what he said or did.
19 Do you believe the testimony? Do you believe the
20 testimony? Does that testimony show beyond a
21 reasonable doubt that the accused was aware that what
22 he was doing was participating in the cocaine business,
23 not just accidental and he knew it was a violation of
24 law to deal in cocaine.

25 The third element, that thereafter one of the

1 members of the conspiracy, any member of the conspiracy,
2 knowingly and willfully committed an overt act and
3 that means did anything that was observable, that
4 was obvious for the purpose.

5 And then, the fourth element, the overt act
6 was committed in furtherance of the cocaine business.

7 If he took a ride, did he do it to negotiate
8 with a buyer, deliver cocaine, to collect the money,
9 to deliver the money?

10 And was that act in furtherance of the
11 conspiracy, the cocaine business?

12 So there is nothing mysterious about it. It
13 need not be a formal, express agreement. The Govern-
14 ment does not have to prove that all the members of
15 the conspiracy got together and understood and agreed
16 on everything about the conspiracy, and the Government
17 doesn't have to show that Mr. A was designated to do
18 this work and B to do this work, one to buy the
19 narcotics, the other to deliver it and the other to
20 sell it. The Government does not have to prove that
21 any of the members of the conspiracy knew one another.
22 But, what they do have to prove that the party to be
23 charged and the defendant understood that there were
24 others in the deal, in their group, carrying on this
25 business, and that in order for them to be successful

1 that everyone had to do their job. Someone had to get
2 the narcotics and someone had to package it and some-
3 one had to get the customers; and someone had to deliver
4 it. The Government must prove that the accused was
5 aware of that.

6 Now, as I say, if the Government proves all the
7 four elements essential to this crime beyond a
8 reasonable doubt then you must find the accused guilty.
9 If you find they have not proved all those elements,
10 then find them not guilty.

11 Again, I hope that I have explained it. I know
12 coming into court as a jury for the first time, it is
13 not an easy concept. But, we have been here now for
14 two weeks and this is the third or fourth time I
15 explained it to you and I hope I got it across to you.

16 The jury may be excused.

17 (The jury withdrew at 4:03 p.m.)

18 (Out of hearing of the jury.)

19 THE COURT: I will take exceptions to the charge.

20 MR. MAHLER: I take exception to the general
21 nature of the charge and I would like to request that
22 you charge the jury formally, the same exact manner as
23 you charged them originally.

24 THE COURT: The same language I gave them
25 three times.